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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
vs.
BEN BARNES, ET AL.

CIVIL ACTION NO. A-71-CA-143
DIANA REGESTER, ET AL.
vs.
BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144
JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.,
vs.
PRESTON SMITH, ET AL.

[Filed, January 28, 1972]

Before GOLDBERG, Circuit Judge, and JUSTICE and WOOD, District Judges.

PER CURIAM:

We are once again in the Texas sector of the political thicket of legislative redistricting and required to contour the condition of the individual trees as well as the physiography of the forest as we explore for "crazy quilts," "groves," contiguity, compactness, specie, motivation in planting, and other possible

impedimenta to constitutionality in redistricting. In ten years of wandering about this political thicket, we have not yet found the burning bush of final explanation.[1] While political processes do not easily lend themselves to judicial explorations, the Supreme Court has directed that the federal courts must play their constitutional roles in assuring the equal protection of the laws with regard to the effectiveness of the individual vote. We do not ever lightly assume the burden of the necessity of meddling with the affairs of another branch of government or with state governments, but the organics of our governmental system have not created the federal courts as political eunuchs. We realize that there is no perfect electoral process, for democracy is at best a search for "proximate solutions" to insoluble problems.[2] But although we essay our task with knowledge of the relative obscurity and difficulty of some inquiries that must be made in a redistricting case, we must nonetheless conduct vigorously our judicial search for the "proximate solutions" to the equal protection of the right to vote in conformance with the constitutional imperatives that have evolved. It is the conclusion of this Court that the Texas redistricting plan for the House of Representatives is not sufficiently proximate to the constitutional imperatives, and we find that plan to be an unconstitutional denial of the equal protection of the laws to all citizens of Texas. There are degrees of trespass, however, and with two exceptions in the proposed House of Representatives that are substantively more compelling than the rest of the Texas proposal, the counties of Dallas and Bexar, we conclude that the state legislature should be given an-

[1] See Exodus 3:2 et seq.

[2] R. Niebuhr, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS (1944).

other opportunity to purge itself constitutionally before this Court feels it incumbent to act judicially to correct the inequities. *See Wells v. Rockefeller*, 1969, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed. 2d 535. In the cases of Dallas and Bexar Counties the quality and the extent of the constitutional trespass is so egregious that it requires immediate relief.

STATUS OF THE CASES

This consolidated action results from four separate cases filed in four district courts. *See* F.R.Civ.P. 42(a). As background to the decision, we believe that it would be helpful to sketch the progress of the cases to their present status.

On October 22, 1971, Curtis Graves, a black State Representative from Harris County, filed suit in the Houston Division of the Southern District of Texas, challenging the constitutionality of the present apportionment of Senatorial districts in Harris County because of alleged racial gerrymandering. Although an injunction against effectuation of the present Senatorial plan was sought by plaintiff, the convening of a three-judge court was not requested. This action was assigned to the court of the Honorable Carl O. Bue, Jr., United States District Judge, Southern District of Texas.

On November 2, 1971, Diana Regester and several other residents and qualified voters of the Tyler Division, Eastern District of Texas, challenged the Legislative Redistricting Board's plan for the House of Representatives on the grounds, *inter alia*, that unconstitutional disparities existed in the population of many House districts and that multi-member districts in Texas result in invidious discrimination against certain racial and political elements. Named as de-

fendants in the suit were the Secretary of State of the State of Texas, the Chairman of the Democratic State Executive Committee, the Chairman of the Republican State Executive Committee, the Chairman of the Democratic Executive Committee of Smith County, and the Chairman of the Republican Executive Committee of Smith County, all of whom are charged by Texas law with the performance of certain duties pertaining to Texas primary and general elections. The plaintiffs, bringing their suit in their individual capacities and in behalf of all qualified voters in Texas, were authorized to maintain their action as a class action by order of the court.

Members of several classes were permitted to intervene, both individually and in their respective capacities, and to maintain their actions as class actions. The classes included: (1) black citizens and voters of Dallas County, (2) Mexican-American citizens and voters of Bexar and Dallas Counties (as well as other counties), (3) Republican citizens and voters of Dallas County, (4) poor and middle class citizens of Dallas County desiring to vote for and run for the office of State Representative, (5) white, black, and Mexican-American citizens and voters who are members of the AFL-CIO, an unincorporated association composed of working men and women throughout Texas, and (6) certain black office-holders in Dallas County. This Court is now of the opinion that those conditional orders previously entered which granted class action status to the Tyler plaintiffs and to the six groups of intervenors enumerated above should be amended, F.R.Civ.P. 23(c) (1). The motions to intervene are granted only with respect to the individual and official capacities of the intervenors. The motions to sue or to intervene as classes are hereby denied in the inter-

ests of the sound judicial administration of these cases, and the pleadings are hereby amended to eliminate references to class representation, F.R.Civ.P. 23(d)(4). *See Whitcomb v. Chavis*, 1971, 403 U.S. 124, —, 91 S.C. —, 29 L.Ed. 2d 363, 367 n. 1.

The Tyler plaintiffs sought only declaratory relief. In his answer the Secretary of State requested a three-judge court pursuant to 28 U.S.C.A. § 2281, alleging that the inevitable result of any declaratory judgment against the defendants would be an injunction to effectuate the judgment and that injunctive and declaratory relief had essentially the same effect in a redistricting case. We do not feel it necessary to resolve the three-judge issue with regard to the Tyler case, for the panel is unanimous on all issues raised coterminously in the Tyler case and in the consolidated cases from the Northern and Western districts.

On November 2, 1971, subsequent to the filing of the Tyler action, suit was brought in the Dallas Division of the Northern District of Texas. The Dallas plaintiffs allege that the apportionment plan for the Texas House of Representatives is unconstitutional in that multi-member districts discriminate against certain racial, religious, student, and political groups. Injunctive relief against the challenged plan of apportionment and the convening of a three-judge court pursuant to 28 U.S.C.A. § 2281 were sought by the plaintiffs. The action was assigned to the Honorable Robert M. Hill, United States District Judge, Northern District of Texas.

On November 24, 1971, the Chairman of the Republican Executive Committee of Bexar County and other Bexar County Republicans filed suit in the San An-

tonio Division of the Western District of Texas, attacking the multi-member apportionments of certain districts of the Texas House on the same general grounds stated in the actions filed in the Eastern and Northern Districts, and alleging that Senatorial districts in Bexar County were politically and racially gerrymandered. Injunctive relief and the convening of a three-judge court were requested by the plaintiffs. The Honorable Adrian A. Spears, Chief Judge of the Western District of Texas, to whom the action was assigned, subsequently made application to the Honorable John R. Brown, Chief Judge of the Court of Appeals for the Fifth Circuit, for the convening of a three-judge court in connection with this case.

PRE-TRIAL PROCEEDINGS

At the direction of Judge Brown, the Honorable Joe E. Estes, Chief Judge of the Northern District of Texas, presided at an informal joint pre-trial conference held at Dallas on December 10, 1971, relating to the foregoing four actions. At the conclusion of the conference, an order was executed by all five of the judges, which found that, in each case, the just, speedy, and inexpensive disposition of the litigation required consolidation and the convening of a three-judge court. Judges Spears, Bue, and Hill each consented to the naming of another judge in his stead to become a member of any three judge court which Judge Brown might convene. Judge Brown approved the order on the day of its entry.

On December 13, 1971, Judge Brown entered an order which constituted a three-judge court in each of the four cases. The order also consolidated the cases for hearing and submission and transferred them to the Austin Division of the Western District of Texas,

see F.R.Civ.P. 42(a). The order also provided the following:

> "The Courts as constituted each have plenary power over all questions including, without limitation, the extent to which any one or more or all of the issues in each of the cases is for determination by a three-judge court or a single judge, and the nature, kind or character of relief to be granted or the form or content of any decrees and orders (whether separately or consolidated)."

We conclude that a three-judge court is required under 28 U.S.C.A. §2281 in the Houston Case, and we deny plaintiff Graves' post-trial motion to sever. The Houston plaintiff asserts that his suit challenges only the redistricting of the Houston Senate districts, not those of the entire state, and that the case is therefore a single-judge matter. We cannot agree, for we conclude that the plaintiff is challenging a state statute of general application throughout the state and is then seeking to *remedy* by injunction one county's apportionment scheme. *See Whitcomb v. Chavis, supra. Compare* the companion cases of *Moody v. Flowers*, and *Board of Supervisors of Suffolk County, New York v. Bianchi*, 1967, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643, where a three-judge court was held improperly convened when the plaintiffs challenged only the *local* districting schemes for county boards of single counties in Alabama and New York. *See also Ince v. Rockefeller*, S.D. N.Y. 1968, 290 F.Supp. 878. Unlike *Moody* and *Ince*, the apportionment challenged in the Houston case is embodied in the Texas redistricting scheme for the entire state Senate, not an apportionment "of limited application, concerning only a particular county." *Moody v. Flowers*, 387 U.S. at 104. Under these circumstances, it is the nature of the statute challenged that requires a three-judge court, however plaintiffs

may attempt to limit the remedy they seek. In addition, it is not clear that the remedy can be limited.[3] The Texas Senatorial districts that are challenged primarily with regard to Harris County are not entirely within Harris County; thus, there could be a domino effect that could reach well beyond the relief given to a single county.[4]

At a joint pre-trial conference held at Austin, Texas, on December 22, 1971, the managing judge of the three-judge court entered an order providing for expedited discovery procedures in view of the filing deadline of February 7, 1972, for candidates for office in Texas. It was also ordered that the chairman of the Republican State Executive Committee and the chairman of the Republican Executive Committee of Smith County be realigned as plaintiffs. At a final joint pre-trial conference on December 31, 1971, it was stipulated by the parties to all four actions that any evidence heard in relation to any one case could be considered by the court with regard to all cases.

BACKGROUND TO PRESENT LITIGATION

Earlier efforts to secure constitutionally sound legislative districting in Texas are recorded in *Kilgarlin*

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[3]The Senate apportionment plan was not challenged on the basis of population deviation, although the total deviation is 4.5%, involving 16,213 people.

[4]Compare also Bussie v. McKiethen, 5 Cir. [No. 71-2783, September 14, 1971] in which the Court of Appeals did not require a three-judge court when the redistricting issue was raised in part under 42 U.S.C.A § 1971(g), the Voting Rights Act, which empowers a single-judge court to act when no application for a three-judge court is made by the Attorney General or a defendant. The Voting Rights Act is not applicable to Texas. In addition, the plan presented by the State of Louisiana was disapproved by the Attorney General of the United States, pursuant to 42 U.S.C.A. § 1973(c), prior to adjudication by a single judge; thus, there was no state plan amenable to injunction.

v. Martin, S.D. Tex. 1966 (three-judge court), 252 F.Supp. 404, *rev'd sub nom., Kilgarlin v. Hill*, 386 U.S. 120 (1967).

Under the provisions of Article 3, Section 28, of the Constitution of the State of Texas, a Legislative Redistricting Board is assembled if the Legislature fails to redistrict the State at its first regular session after the publication of each United States decennial census. Thus, the 62nd Session of the Texas Legislature, convened in January, 1971, was under constitutional mandate to redistrict both House and Senate.

No districting plan for the Senate was ever voted by the Legislature. The districting bill adopted for the House of Representatives was declared unconstitutional by the Supreme Court of Texas in *Smith v. Craddick*, 1971, 471 S.W.2d 375. The Legislative Redistricting Board then refused to redistrict the House, asserting that it had no power to do so. However, in *Mauzy v. Legislative Redistricting Board*, 1971, 471 S.W.2d 570, the Supreme Court of Texas issued a writ of mandamus ordering the Board to effect such redistricting. On October 15, 1971, the Board enacted a plan which redistricted the Texas Senate, and on October 22, 1971, it enacted a plan for the House of Representatives. Both plans are under attack in the current quartet of litigation.

I.

In *Reynolds v. Sims* the Supreme Court wrote:

> "By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to con-

> struct districts, in both houses of its legislature, as nearly of equal population as is practicable.
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> * * * * *
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> [T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."

377 U.S. 533, 577, 84 S.Ct. 1362, —, 12 L.Ed.2d 506, 536 (1964).

Subsequently, the Court made clear that whenever the fact of deviation from population equality is raised the burden falls upon the State to present "acceptable reasons for the variations among the populations of the various legislative districts." *Swann v. Adams*, 1967 385 U.S. 440, 443-444, 87 S.Ct. 569, —, 17 L.Ed.2d 501, 504. It also reiterated that allowable deviations were limited to those minor variations which "are based on Legitimate considerations incident to the effectuation of a rational state policy," *Reynolds v. Sims, supra*, 377 U.S. at 579, and which "may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination." *Roman v. Sincock*, 1964, 377 U.S. 695, 710, 84 S.Ct. 1462, —, 12 L.Ed.2d 620, 630.

In *Reynolds* the Court noted:

> "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement."

377 U.S. at 577. While not departing from the recognition that "[*d*]*e minimus* deviations are unavoidable," *Swann v. Adams*, 385 U.S. at 444, in *Kirkpatrick v. Preisler*, 1969, 394 U.S. 526, 531, 89 S. Ct. 1225,

—, 22 L.Ed.2d 519, 524, a congressional redistricting case, the Court concluded:

> "We can see no nonarbitrary way to pick a cutoff point at which population variances suddenly become *de minimus*. Moreover, to consider a certain range of variances *de minimus* would encourage legislators to strive for that range rather than for equality as nearly as practicable."

Consequently, in *Kirkpatrick* the Court elucidated its previous statements by holding as follows:

> "[T]he 'as nearly as practicable' standard requires that the State make a good faith effort to achieve precise mathematical equality. See *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). Unless population variances among . . . districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small.
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> * * * * *
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> "[The Constitution] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."

394 U.S. at 530-531. Because of differing factual situations from State to State, including the total population and the number of legislative positions, it remains true that "[w]hat is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case." *Reynolds v. Sims*, 377 U.S. at 578. The Supreme Court has implied its willingness to exercise greater "tolerance" in reviewing the State's justifiation for population deviation in the apportionment of State legislatures:

> "In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry [*Wesberry v. Sanders*,

1963, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481]—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

Reynolds v. Sims, 377 U.S. at 577-578. *See also Abbate v. Mundt*, 1971, 403 U.S. 182, 91 S.Ct. —, 29 L.Ed. 2d 399, which upheld a county legislative apportionment with a total deviation of 11.9%. However, the Court itself made very clear that *Abbate* was *sui generis*, involving only local government apportionment. And the *Kirkpatrick* holding may substantially erode the "tolerance" dictum in *Reynolds*. In any case, the percentages upheld and rejected in other cases are of little enlightenment. The critical issue remains the same: Has the State justified any and all variances, however small, on the basis of a consistent, rational State policy? While confessing the impossibility of exactitude in striving to fulfill the constitutionally mandated concept of one person, one vote, one value, the Court insists on conformity to this fundamental premise:

"[I]f . . . population is submerged as the controlling consideration in the apportionment of

seats in the particular legislative body, then the right of all the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired."

Reynolds v. Sims, 377 U.S. at 581.

The 1970 Census reported the population of Texas as 11,196,730. The Texas House of Representatives is allotted 150 members. Hence, the average population per member is 74,645. According to the state's own figures, District 3 is overpopulated by 5.8% (4,298) and District 85 is underpopulated by 4.1% (3,081), for a total deviation of 9.9% (more than 7,300).*

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*Furthermore, the State's method of computing deviations in the multi-member districts may distort the actual percentage deviations in those eleven districts. The method, which corresponds to a method that was disapproved by the district court in *Kilgarlin* with regard to flotorial districts, consists of dividing the total population of a multi-member district by the number of representatives allotted to it and then distributing the population deviation to each representative position as if each position constituted a single-member district, arguably resulting in a sort of buried flotorial district. But a multi member district is not a collection of single-member districts. It is one district, the plaintiffs contend, and the population excess or deficiency should be treated just like the population excess or deficiency in any other district: the total amount of deviation for the district should be calculated as a percentage above or below the single norm of the *ideal* district (74,645). The alleged distortion resulting from the State's calculation is best exemplified by the case of Dallas County. Alloted eighteen representatives for its population of 1,327,321, Dallas County is listed by the State as underpopulated by 1.2% (per representative position). If left undistributed, the total deviation for Dallas County, treated as one unit, would be approximately minus 21.6%. The parties' respective computations for Bexar County produce figures of plus .7% by the State and approximately plus 7.7% by the plaintiffs. Hence, the plaintiffs would calculate the total deviation for the State as about 29.3%, rather than 9.9%.

Since we have concluded that the 9.9% total deviation is not the result of a good faith attempt to achieve population equality as nearly as practicable, it is unnecessary for us to resolve this complex computational conflict. But we do think it significant to note that the total deviations for Dallas and

In all of the evidence presented in this case, the State has not attempted to explain in terms of rational State policy its failure to create districts equal in population as nearly as practicable, nor has the State sought to justify a single deviation from precise mathematical equality. The lengthy depositions of the members of the legislative redistricting board and of the staff members who did the actual drawing of the legislative district lines are devoid of any meaningful indications of the standards used.

We must conclude that the State simply has not justified, under the constitutional mandates that we are required to apply, the deviations that admittedly exist in the plan before us. The State has argued that the deviations are justified in order to comply with a long-standing state policy, embodied in Section 26 of Article III of the Texas Constitution, against crossing county lines. We agree with the State to the extent of saying that this Court would look askance at any wholesale and unnecessary mutilation of the political subdivision boundaries within the State. However, the preservation of county lines is simply not a per se justification for a population deviation. *Reynolds v. Sims, supra*; *Kirkpatrick v. Priestler, supra.* The real question is: Has Texas demonstrated a rational and consistent reason for maintaining its county lines at the admitted expense of greater disparities in population deviations? As the Texas Attorney General recognized in the predecessor case of *Kilgarlin*: "[C]oun-

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Bexar Counties, respectively, amount to about 16,000 people and 5,500 people, for a total of around 21,500 people. The percentage deviation figures are only a shorthand method of expressing the "loss," dilution, or disproportionate weighting of votes. Just as the Court in *Reynolds* concluded that legislators represent people, not trees or cows, so we would emphasize that legislators represent people, not percentages of people.

ty lines must be violated . . . to the extent necessary to carry out the mandate of the Supreme Court." 386 U.S. at 123 n. 2. The present plan cuts the boundaries of 19 counties. We have been given no explanation whatsoever of the rational and consistent state policy that would necessitate the following of county lines in apportioning the Texas Legislature at the admitted expense of a substantial population deviation.

The last clause of Article III, Section 26 of the Texas Constitution reads as follows:

> "[W]en any one county has more than sufficient population to be entitled to one or more Representatives, such representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

In 1965, pursuant to this proviso, the Legislature created several so-called flotorial districts. *See Davis v. Mann*, 1964, 377 U.S. 678, 686-687 n. 2, 84 S.Ct. 1453, —, 12 L.Ed.2d, 609, 615, for descriptions of such districts. These flotorial districts were disapproved by a three-judge federal court in *Kilgarlin v. Martin*, S.D. Tex. 1964, 252 F.Supp. 404, 418, *aff'd sub nom., Kilgarlin v. Hill, supra.* Consequently, the Texas Supreme Court enunciated a procedure to be followed thereafter to comply with the State constitutional mandate, subject of course to the superseding requisites of the Fourteenth Amendment:

> "4. With the nullification of the dictate relative to use of the surplus population (less than enough for a district) of a county which already has one or more representatives allocated thereto, it becomes permissible to join a portion of that county (in which the surplus population resides and which is not included in another district within

that county) with contiguous area of another county to form a district. For example, if a county has 100,000 population, and if a district of 75,000 population is formed wholly within that county, the *county* is given its district, and the area wherein the 25,000 live may be joined to a contiguous area."

Smith v. Craddick, 1971, 471 S.W.2d 375, 378. In 1967 the Legislature, following Kilgarlin, enacted a redistricting plan which was in conformity with the procedure subsequently approved for dealing with the surplus population in various counties. In the face of this unanimous and explicit directive of the State's highest tribunal, the legislative redistricting board, in four separate instances, has split the surplus population (the population greater than that allocable to a whole number of representatives) between two additional districts. Thus, Smith and Brazoria Counties received one whole representative, Hidalgo two, and Jefferson three; but the excess population in each county was divided between two other representatives' districts. The State has ventured no explanation whatsoever even of the necessity for these depredations against the State policy.

The only crossing of a county boundary for which the State suggested an explanation was that of Red River County. While it is certainly understandable that cutting some county line in this area was necessary because of the population and location of Bowie County, no justification was advanced for the resulting plus 2.2% deviation in District 1 (Bowie and part of Red River) or for the plus 2.9% deviation in District 9 (the other part of Red River and five other counties). Moreover, the policy of preserving the integrity of county lines has been blatantly violated by the slicing of Smith and Hidalgo Counties without any justifica-

tion to be found in the Fourteenth Amendment mandate for substantial equality. The State's figures show a plus 3.3% deviation for District 2 (one part of Smith and four other counties) and plus 2.6% deviation for district 14 (another part of Smith and three other counties). District 12, wholly within Smith County, contains only a plus .1% deviation. The State's figures also show a plus 1.5% deviation for District 51 (part of Hidalgo and part of Cameron County), a plus 2.2% for District 49 (another part of Hidalgo and three other counties), and a minus 2.9% in District 59 (a two-member district wholly within Hidalgo County). It should be emphasized that, leaving aside the deviations involved in the multi-member districts, unjustified deviations exist throughout the State, even in adjoining legislative districts. An example of the latter situation exists in East Texas, where District 3 (two whole counties) is overpopulated by 5.8% and District 4 (three whole counties) is underpopulated by 3.6%. The following list, which is not intended to imply an acceptable *de minimus* percentage, demonstrates the geographic distribution and varying make-up of the single-member districts with the largest deviations:

District	*Percentage Deviation*	*Location*
18	plus 3.4	two southeast counties
27	plus 4.2	two northeast counties
28	minus 3.1	two east central counties
30	plus 3.2	five south central counties
38	plus 5.7	three south central counties
39	plus 3.6	six south central counties
40	minus 4.1	two gulf coast counties
45	plus 4.6	six southwest central counties and part of Bexar County
54	plus 3.8	five north central counties

55	plus 3.1	six northwest central counties
57	plus 3.4	two Rio Grande Valley counties
62	minus 3.2	the "core" of Taylor County (Abilene)
66	minus 3.1	ten Panhandle counties
70	plus 4.3	nine Rio Grande Valley counties
77	plus 4.1	seven northwest counties
78	minus 3.7	part of Harris County
85	minus 4.1	part of Harris County
92	minus 3.7	part of Harris County

Even had the State demonstrated rational adherence to a State policy of not cutting county lines, deviations in several of the above districts would still be inexplicable. Adding a portion of Bexar County to the rest of District 45 increased its deviation by more than plus 4%. District 62 is totally surrounded by District 61, which has a minus 1.7% deviation; and District 61 is adjoined by District 55, which has a deviation of plus 3.1%. Having such large deviation in the three listed districts in Harris County is insupportable.

In addition to the fact that the State itself has not complied with the Texas Supreme Court's rulings in *Craddick*, we note that *Craddick* offers little if any satisfaction of the *Reynolds* requirement that a State must justify any population deviations. *Craddick* simply makes no effort to explain any rational state policies that may be ensconced in Article III, § 26 of the Texas Constitution and the relation of that provision to the apportionment requirements of the Fourteenth Amendment. In fact, the Texas Supreme Court made clear that

> ". . . [t]he constitutionality of this redistricting statute (Article III, § 26 of the Texas Constitu-

tion) is the only question presented to us by the briefs and record."

471 S.W.2d at 376. And the Texas Supreme Court correctly noted:

> "Again, all requirements of Section 26 [of Article III] are inferior to the necessity of complying with the Equal Protection Clause."

471 S.W.2d at 378. Finally, the Texas court concluded that the variegated disturbances of county lines perpetrated by the *Craddick* apportionment plan were not "either required or justified to comply with the one-man, one-vote decisions." 471 S.W.2d at 378. We fail to see how the State of Texas can argue that its own failure to produce evidence in *Craddick* regarding the constitutional mandates of the Equal Protection Clause can somehow help to explain satisfactorily its failure to justify its population deviations in the new plan that is challenged in the instant cases. *Craddick* stands primarily for the proposition that the restrictive language of Article III, § 26 of the Texas Constitution is not facially unconstitutional under the Federal Equal Protection Clause. Beyond that, the Texas Supreme Court summed up the general position that this Court must take:

> "[A] county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment."

471 S.W.2d at 377.

From the evidence and the plan presented, this Court is forced to conclude that the State of Texas simply had no rational state policy in the apportionment plan that resulted in the population deviations previously discussed and in the disparate treatments of metropolitan areas. The plan before the Court was not a product

of legislative action, but of the action of a board of five members, only one of whom is a member of the legislature. It appears to this Court that the board never really acted as a board but only as individuals. There never seems to have been a tandem of operations among the board members with regard to the constitutional principles or even to any lesser policy guidelines. The committee met for hearings only four times. The full board did not participate in two of those meetings, and one member of the board testified that he did not pay much attention to the hearings in any event. The full board did not even meet to approve the final plan; it was merely passed around. In fact, only three members of the committee signed both plans. There is ample testimony that the board was given absolutely no legislative guidance, nor did the board begin from the legislative discussions that accompanied the earlier apportionment plans for Texas. As an example of what we must conclude to be considerable lack of rational direction, at no point in its deliberations did the board ever debate or discuss the general issue of single-member districts as opposed to multi-member districts, obviously a very important issue in any apportionment plan, and particularly in the Texas proposal. At no point in the case was there ever a rational and consistent explanation of the differing treatments accorded to Harris County as contrasted with every other metropolitan area in Texas. One conceivable and previously-urged "rational" explanation for these disparate treatments of metropolitan areas was thoroughly repudiated by the board's actions. In *Kilgarlin* the three-judge court was assured by the defendants* that the State's policy "limits the size of any multi-member district to fifteen Representatives" and that any coun-

*Two of the five board members were defendants in the *Kilgarlin* case.

ty that attained a million or more residents in the future would be subdivided for Representative districts. In their trial brief the State asserted that the explanation for the differing treatment of Dallas and Harris Counties was that whenever a county attained a million residents or was allocated fifteen legislators it would no longer be left as an at-large district. The district court in *Kilgarlin* approved the disparate treatment between Dallas and Harris Counties in the 1965 apportionment bill in reliance upon the State's representation that different treatment would be accorded a county once it attained a million population. Dallas County now has a population of well over one million, a greater population than Harris had in 1960. This earlier "policy" of the State of Texas was called to the attention of the redistricting board during its public hearings but was apparently ignored. The board's unexplained abandonment of an existing state policy belies the presence of any rational state policy.

This Court feels compelled to draw two conclusions from the evidence presented regarding the manner in which this plan was drawn:

First, whatever "tolerance" might conceivably attach to a State's explanation of deviations from a population ideal cannot reasonably or appropriately attach to the actions of a redistricting board which acted on the House of Representatives' plan only pursuant to a mandamus, *Mauzy v. Redistricting Board, supra*, and which proceded to draw its conclusions in the manner just sketched. *See Silver v. Brown*, 1965, 46 Cal. Rptr. 308, 405 P.2d 132; *Legislature of the State of California v. Reinecke*, Sacramento No. 7917 [January 18, 1972]. *See generally Connor v. Johnson*, 1971, —*U.S.* —, 29 L.Ed. 2d 268, 91 S.Ct. —. We have serious doubts that this board did the sort of deliberative job contemplated by *Reynolds* as worthy of judicial abstinence.

Second, the State has failed to establish any rational and consistent state policy that would explain, let alone justify, its deviations from the constitutional principles of *Reynolds* and its progeny. Texas has also failed to provide rational justification for the haphazard combination of single and multi-member districts at issue in this case. This irrrationality, without reasoned justification, may be a separate and distinct ground for declaring the plan unconstitutional. Arguably, the Fourteenth Amendment forbids a plan that reflects "no policy, but simply arbitrary and capricious action," *Baker v. Carr*, 1962, 369 U.S. 186, 226, 82 S.Ct. 691, —, 7 L.Ed.2d 663, 691, *Reynolds v. Sims, supra,* and which is not "free from any taint of arbitrariness or discrimination," *Roman v. Sincock, supra*, entirely independent of any population deviations: "To the extent that a state's legislative apportionment plan is conclusively shown to have no rational basis, such a plan violates the equal protection clause." *Davis v. Mann*, 1964, 377 U.S. 687, 694, 84 S.Ct. 1453, —, 12 L.Ed.2d 609, 619 (concurring opinion). *Cf. Swann, supra*, at 572. Even where there are theoretically valid rationales for deviating from exact population equality, those rationales must themselves be applied systematically throughout the state, not in an ad hoc manner in certain places and not at all in others. *See Kirkpatrick v. Priesler, supra.*

Several courts have invalidated plans containing unexplained mixtures of single and multi-member districts. In *Kruidenier v. McCullock*, 142 N.W.2d 355 (1966), the Iowa Supreme Court declared unconstitutional a reapportionment plan making one county a multi-member district while dividing the other counties into single-member districts. The court held that the scheme would not be sustained without reasoned justification. Since the State failed to show this, the court

declared the plan invalid. A federal district court in Pennsylvania invalidated a reapportionment plan which, like the Texas scheme, contained a "curious pattern of representative districts in the larger counties." *Drew v. Scranton*, N.D. Pa. 1964, 229 F.Supp. 310, *vacated and remanded on other grounds*, 1964, 379 U.S. 40, 85 S. Ct. 207, 13 L.Ed.2d 107. The district court particularly condemned the inconsistent and irrational method used in distributing single and multi-member districts. The court described a situation closely analogous to the one in this case:

> "Defendants have offered no explanation for thus dividing 14 of the larger counties entirely into single member districts while at the same time, dividing the 15 other larger counties, many of them adjoining the single-member district counties, into a crazy quilt of 1, 2, 3, & 4 member districts. . . . In the absence of any legislative history or other explanation justifying it and we have found none, we can only conclude that this districting is either the result of gerrymandering for partisan advantage . . . or that it is wholly arbitrary and capricious. The plaintiffs' contention is that thus providing a haphazard arrangement of 2, 3, & 4 member districts alongside of single member districts violates the basic principle of one man, one vote, which is, as we have seen, implicit in the constitutional sense of equal protection of laws in this field. We are constrained to agree with this contention."

229 F.Supp. 236.

The most important inconsistency to be found in the Texas House plan is the different treatment given to the heavily populated counties. Harris County, the largest, is split into 23 single-member districts; all the other populous and metropolitan counties are put in multi-member districts of varying numbers of members,

ranging up to 18 for Dallas County. Three of the 11 multi-member districts comprise entire counties (Travis, McLennan, and Dallas); in the other eight multi-member districts, the district lines cut boundaries without rhyme or reason. The board's mixture of multi-member districts is not explicable as an effort to preserve county lines or to achieve substantial population equality. The plan cannot be justified on the ground that it reduced deviations in population. Nor can the State justify the present plan on the basis of past State policy of either preserving county lines or limiting the size of districts. *See Kilgarlin v. Martin, supra.* The claim that Dallas was kept at-large to conform to popular sentiment is simply contradicted by the record; moreover, even if the board based its treatment of Dallas on grassroots sentiment, it could not constitutionally apply this standard in selected areas only. *See Kirkpatrick v. Preisler, supra.* More important, as the Supreme Court held:

> "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme fails to measure up to the requirements of the Equal Protection Clause."

Lucas v. Colorado General Assembly, 1964, 377 U.S. 713, 736, 84 S.Ct. 1472, —, 12 L.Ed.2d 632, 647.

II.

Because of our holding under *Reynolds*, we are not compelled to decide other questions raised by the plaintiffs pertaining to the entire State of Texas, although we do feel compelled to reach conclusions later in the opinion with regard to specific metropolitan areas.[1]

[1]Attorneys for the plaintiffs in the cases originally filed in the Eastern, Northern, and Western Districts indicated to the

Although we approach the apportionment question with restraint, as we have indicated earlier, we would not fulfill our judicial responsibilities if we were to ignore the development of some major points of consideration for the Legislature, specifically considerations regarding multi-member districts. Therefore, when the Legislature reconsiders the general redistricting question, in conformity with our holding in Parts I, III, and IV, we believe that the following points should be given consideration in light of recent Supreme Court decisions and of the very real possibility of future litigation.

While multi-member districts are not per se unconstitutional, neither are they constitutionally unassailable. *See generally, Whitcomb v. Chavis*, 1971, — U.S. —, 91 S. Ct. —, 29 L.Ed.2d 563; *Fortson v. Dorsey*, 1965, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401; *Burns v. Richardson*, 1966, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed. 2d 376. The underpinning of the apportionment cases is the Fourteenth Amendment right of the individual voter to an effective vote within the general constructs of what is essentially a majoritarian system of repre-

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court that, because of the inherent time limitations incident to these actions, they would have difficulty in fully developing the evidence relating to their claims regarding multi-member districts other than Dallas and Bexar, and that therefore they would confine their evidence to the situations obtaining in those two counties. In response to this situation the Assistant Attorney General, representing the State at the preliminary pre-trial conference on December 22, 1971, observed:

> "This is my personal view entirely, but I would think that the Plaintiffs' case can either be made or not be made in two or three of the major metropolitan areas, and I would anticipate, at least, that if the multimember districting were knocked out, say, in Dallas and Tarrant County and Bexar County, that probably it would not be used elsewhere either, so that I have some difficulty personally in seeing the necessity of trying these issues as to eleven different metropolitan areas."

sentative government. *See generally, Reynolds v. Sims, supra*; *Kirkpatrick v. Priesler, supra*; *Swann v. Adams, supra.* To our mind, a critical adjunct to the right to an effective vote is the First Amendment right to associate politically, whether in majority or minority. *See Williams v. Rhodes*, 1968, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24; *see generally, NAACP v. Button*, 1963, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405; *NAACP v. Alabama*, 1958, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed. 2d 1488; *See also Carter v. Dies*, N.D. Tex 1970 (three-judge Court), 321 F.Supp. 1358.

While the Fourteenth Amendment does not prohibit all unequal treatment of individuals or groups and does permit rough accommodations, it does prohibit "invidious discrimination." *Harper v. Virginia Board of Elections*, 1966, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed. 2d 169.

> "[T]he concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Reynolds v. Sims, 377 U.S. at 565. Whenever a State fashions a system that provides for unequal treatment among citizens who are roughly within the same congeries of circumstances, with regard to the "fundamental political right, of the vote, *Yick Wo v. Hopkins*, 1886, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, or to the First Amendment right to associate "for the advancement of political goals," *Williams v. Rhodes, supra*, that State would be required to justify its unequal treatment on the basis of a "compelling state interest," *NAACP v. Button, supra. See generally, Harper v. Board of Elections, supra*; *McDonald v. Board of Election Commissioners of Chicago*, 1968, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739; *Kramer v. Union Free*

School District, 1969, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583; *Cipriano v. Houma*, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647. This is particularly true when the state's distinctions in these fundamental areas are drawn on the basis of wealth. *See Harper v. Board of Elections, supra*; *Carter v. Dies, supra*; *see also Rodriguez v. San Antonio Independent School District*. No. 68-175-SA [December 23, 1971]. Of course discriminations within the law that affect political candidates correspondingly affect the right to vote and the right to associate politically, *Williams v. Rhodes, supra*. Therefore, if it can be established that a particular electoral apportionment scheme or even an entire electoral mechanism, discriminates among candidates and political groups on the basis of wealth, the test that the State must meet in order to justify the continuing inequality of treatment is one of compelling state interest.*

Some of plaintiffs before this Court are office-holders and potential candidates. And of course when we adjudicate the apportionment question or when the Legislature deliberates the question, the Court or the Legislature is also affecting the rights of candidacy and of political association.

It has been clearly established in the proceedings before this Court that it simply costs more for a candidate to run and to communicate with his or her electorate in any multi-member district than it does in any single-member district given roughly similar geographic and demographic circumstances, specifically given

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*"To discriminate against voters or candidates on the basis of the depth of their pocketbooks . . . is to wade into unconstitutional waters."

Carter v. Dies, 321 F.Supp. at 1364 (Thornberry, J., concurring).

a metropolitan area.[9] The sheer numbers of people with whom one must communicate as a candidate vary enormously between multi-member and single-member districts. While the "ideal" Texas district is one of just more than 74,600 people, a candidate for one of the eighteen seats to the Legislature from Dallas County must campaign to over 1,300,000;[10] a potential candidate in Bexar County must plan on communicating to over 800,000; in Tarrant County a candidate must try to appeal to more than 600,000; and even in the smallest multi-member district, a part of Hidalgo County, a hopeful candidate must still take his campaign to 145,000 people. In addition, when the size of the campaign territory is increased to well over that of the ideal single-member district, as it is in every metropolitan multi-member district in Texas, the record establishes that the methods of campaigning become different and more expensive. When a candidate campaigns in a compact metropolitan area to a population of from 145,000 to 1,300,000 he must turn to high-expense methodology, such media as television, radio, or large newspaper spreads. If he were running in the "ideal" district, with only 74,600 people to reach, the record indicates that a candidate would be able to, and

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[9]Of course the costs of campaign and communication vary substantially within Texas on the basis of geography alone; the costs in a single-member district in West Texas, for example, would differ, perhaps substantially, from the costs for a similar campaign or communication in a single-member district in an urban area such as Harris County. For a variety of demographic or geographic considerations, the expenses of campaigning and communicating may differ radically among political subdivisions without impinging on constitutional rights guaranteed to individuals and to groups. However, that observation does not answer the constitutional problem here.

[10]One witness estimated that a campaign for a House seat in Dallas by an individual candidate not running on a slate would cost about $87,000; the salary of a Texas Representative is $4,800 per year.

inclined to, employ less costly methods of campaigning and avoid television expenses in particular. All of this is not to say that television time, for example, is required by the adoption of any particular districting processes. It is to say, however, that there are substantial cost differences in campaign and communication expenses that are necessary in order to make a tenable showing as a candidate in a multi-member metropolitan district, that such costs in multi-member districts may operate to eliminate or to delimit candidates and political associations that would otherwise be able to wage more tenable campaigns, and that such differences in cost between single-member and multi-member districts are the result of the state action of redistricting.

Whether or not this inequality in campaigning costs between multi-member and single-member districts would be enough to invalidate all multi-member districts on First and Fourteenth Amendment grounds, independent of any disparate treatment among similar areas, we do not decide here. We doubt that such inequalities amount to invidious discrimination. The record before us is just not adequate in its facts to support the proposition that an identifiable individual candidate or political group in every Texas city has been discriminated against invidiously on the basis of wealth by the use of multi-member districts. To our knowledge the Supreme Court has not confronted this issue in any of the cases in which multi-member and single-member districts have been discussed, and we do not reach that precise issue in our case.

However, we do find in the Texas plan an anomalous bit of redistricting that does raise a considerable Equal Protection question along the same theoretical lines that we outlined above with regard to candidates and political associations. Whatever else may be said about

single-member districts versus multi-member districts, it is clear that they create radically unequal expense problems for candidates who wish to run for office in areas with very similar geographic and demographic characteristics. Every multi-member district in Texas is a metropolitan area. And every major metropolitan area of Texas has been multi-member districted, save one. The fact that Harris County (Houston) has been divided into single-member districts means that a candidate running in Harris County for the Texas House is treated by Texas law in a manner that differs substantially from the treatment according to candidates running for the Texas House from every other metropolitan area in Texas. That difference in treatment results in a classifying of candidates and their abilities to run and to form political associations according to wealth, affecting basically and unequally the poor, *see Harper v. Board of Elections, supra*, and those not members of established political parties, *see Williams v. Rhodes, supra*. We emphasize that this is not a classification of differing groups with differing geographic and demographic surroundings, but of very similar urban electorates living in very similar geographic and demographic surroundings. In general, candidates from the cities must confront very similar problems and issues. The differing treatment of Harris County appears to result in a substantive inequality on the basis of wealth in the protection afforded by the State's electoral laws to the rights of political association and voting."

"The fact that a candidate might be able to decrease his or her expenses by joining the Democratic or Republican Party, or by running on an established slate, does not satisfy the requirements of the First and Fourteenth Amendments. See Williams v. Rhodes, *supra*; Carter v. Dies, *supra*. Nor does running through a particular party or on a particular slate

The question then becomes: Has Texas demonstrated a compelling state interest for treating the candidates and political associations of Houston in a way different than it treats the candidates and political associations of other metropolitan areas of Texas? The State argues that it was following the "wishes of the people" when it dealt with its metropolitan areas. The argument simply does not ring true. The record demonstrates at several points that the people of Dallas indicated their overwhelming desire, by poll, for single-member districts; that evidence was placed before the redistricting board by several witnesses at its hearings, and the committee either ignored or denied those wishes. At the same time, there is no evidence in the record that the redistricting board had before it any coherent "wishes of the people" of Houston or of any other area. The only reason assigned for this difference of treatment between Houston and every other metropolitan area is that some atmospheric sounding emanating from Harris County differed from those coming from other metropolitan counties. Such sonars must have some substantive or scientific basis for measurement data. It appears to this Court that if a State elects to use the "wishes of the people" to treat metropolitan areas differently and unequally, then it is under some obligation to do a more thorough job of investigating the real "wishes of the people" than was done by the Redistricting Board. Even if the atmospheric soundings were eventually adequate as a statistical matter, it is very questionable whether the State could submit opinion polls as a complete justification for taking constitutionally suspect action in apportioning a state legislature. *See Hall v. St. Helena Parish School Board,*

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appear to diminish substantially the cost differentials between urban multi-member districts and urban single-member districts in Houston.

E.D. La. 1961, *aff'd*, 1962, 368 U.S. 515, 82 S.Ct. 529, 7 L.Ed.2d 521, *cited with approval in Lucas v. Colorado General Assembly*, 1964, 377 U.S. 713, 84 S.Ct. 1472, 12 L.Ed.2d 632. And, of course, any rationale, including opinion polls, would have to be applied equally to all areas of the State, not followed for one and ignored in others.

A second argument advanced by the State for its anomalous treatment of Harris County is what might be termed the "*Whitcomb v. Chavis* argument": that multi-member districts are constitutionally immune unless they dilute a racial or political element of the electorate. We simply point out that *Whitcomb* at no point discussed the relationship of multi-member districts to candidates and political associations. In addition, the Supreme Court in *Whitcomb* was not faced with different districting treatment according to similar metropolitan areas; the large urban areas of Indiana were treated in the same manner. There was an underlying rationale to the *Whitcomb* discussion of multi-member districts in Indiana: the State of Indiana argued that cities have city-wide problems and should elect city-wide representatives. Whatever might still be argued concerning the various factors within that justification for multi-member districts in *Whitcomb*, it is clear that Texas cannot offer the same rationale for its apportionment of its cities. The different treatment of Houston refutes the *Whitcomb* rationale at the threshold, and Texas confronts an entirely different Equal Protection question. Texas simply cannot justify its different treatment of Houston candidates on the basis of *Whitcomb* because its own internal inconsistencies in its treatment of Texas cities erases the general *Whitcomb* rationale for maintaining multi-member districts in metropolitan areas.

Texas also points to the *Kilgarlin* case, in which a three-judge district court and then the Supreme Court upheld a treatment for Houston that differed from that accorded to every other Texas city. In the plan under discussion in *Kilgarlin*, Houston was divided into thirds, along congressional district lines, while all other metropolitan areas in Texas were left as county-wide multi-member districts. Again, we point out that neither the district court nor the Supreme Court discussed the allegedly unequal treatment of candidates or political groups that may have resulted from that differing treatment. In addition, a division into thirds may not create the vast inequalities of expense that a division into single-member districts creates. Finally, we would note that the justification for differing treatment that was accepted by the courts in *Kilgarlin* was, like the *Whitcomb* justification, accepted for an underlying reason. The district court accepted the distinction that the State drew in 1966 between counties with more than one million people and those with less than one million; the State contended that the sheer numbers and the resulting confusion that would probably occur in the electorate when the number of representative slots reached 15 necessitated a different treatment for the one million-plus counties. *See Lucas v. Colorado General Assembly, supra.*[18] Like the rationale of *Whitcomb*,

[18] "One of the most undesirable features of the existing apportionment scheme was the requirement that, in counties given more than one seat in either or both of the houses of the General Assembly, all legislators must be elected at large from the county as a whole. Thus, under the existing plan, each Denver voter was required to vote for eight senators and 17 representatives. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies within the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them."
377 U.S. at 731.

we do not believe that the rationale accepted in *Kilgarlin* can explain a compelling State interest in this present incarnation of different treatment for Harris County. As we have indicated earlier in the opinion, Dallas County in 1971 fits all the elements of the *Kilgarlin* rationale for single-member districting, and yet Dallas remains a multi-member district, against the wishes of Dallas citizens we might add, while Houston has been subdivided even further than it was in the 1966 plan discussed in *Kilgarlin*. We can only conclude, as we did earlier, that there is simply no credibility left in the rationale advanced by the State in *Kilgarlin*. A state that inexplicably abandons an allegedly "compelling state interest" only five years after arguing it can hardly raise it from the dead at this point in the apportionment process.

Finally, the State argues that multi-member districts for metropolitan areas have long historical roots in Texas. Even given that fact, it simply does not explain the different treatment given to Houston. With the exception of the 1965 plan, the *Kilgarlin* plan discussed earlier, Houston has been treated under the same "historical" aegis as any other Texas city. We are at a loss to understand how Texas history can support a compelling state interest in multi-member districts for all cities when that history has suddenly done a complete about-face for the largest metropolitan area in the State. In addition, we would point out that history is a questionable justification for unequal treatment in a state with a history of rather active segregation and a state which has always been a "one-party" state. *See Bussie v. McKiethan*, 5 Cir., No. 71-2698 [September 4, 1971]. The underlying rationales of the Texas tradition of multi-member districts in metropolitan areas might very well be precisely those rationales condemned in recent constitutional decisions. We

emphasize that we are not indulging in any sort of speculation whatsoever regarding the rationales for the political subdivisions of Texas. We are simply noting that Texas cannot rationally and consistently justify its different and unequal treatment of Houston and Houston candidates on the grounds of historical precedent. In addition to the factors discussed in other parts of the opinion, *see Reynolds v. Sims, supra*; *Kirkpatrick v. Priesler, supra*, the fact that Harris County has been treated differently, even though it falls within the same historical context as any other city, makes the position internally inconsistent.

Given the record before us, this Court must note that Texas has not established a compelling state interest, nor even a "rational relationship,'"[11] to justify its disparate and unequal treatment of Harris County and every other metropolitan area in Texas. Because of the unjustified differentiation between Harris County and every other metropolitan area with regard to the expense of running for office and of communicating with an electorate, the use of multi-member districts in Texas cities is subject to serious constitutional question on the bases of the First Amendment, the Due Process clause, and the Equal Protection clause. The other side of the candidate coin is that (sic) fact that the electorate is much further removed from its elected representative in Dallas or Fort Worth or El Paso, for

[11]Even if the State were forced to meet only the lesser test of showing a "rational relationship" between its unequal treatment of Houston candidates and political associations and a state policy, we would be forced to conclude that Texas simply has not done so on this record. The disparate apportionment of Harris County renders questionable or outright irrational the justifications that the State has proposed for continuing to sanction vastly different campaign and communication costs among its urban representatives and urban electorates. See Harper v. Board of Education (Harlan, J., dissenting).

example, than is the electorate for the same office in Houston. While we are far from the Jeffersonian ideal or the modes of Grecian democracy, this voter anonymity, this contracting the voter to be a mere speck in a magnitudinous cosmos, takes us far from the founding fathers' concept of citizen participation.

III.

One of the contentions of the Dallas plaintiffs is that the use of a multi-member district in Dallas County in the legislative redistricting plan operates to minimize or cancel out the voting strength of the black minority. Of course, it is settled law that apportionment schemes employing multi-member districts will constitute an invidious discrimination if it can be shown that "designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson v. Dorsey*, 379 U.S. at 439. In its most recent pronouncement concerning the constitutionality of multi-member districts, the Supreme Court reaffirmed this principle. The case of *Whitcomb v. Chavis, supra*, involved a constitutional challenge to the multi-member state legislative districts in Marion County, Indiana (Indianapolis), which has a population of 700,000 and a plurality voting system, but no provision for at-large candidates running from particular geographical subdistricts. The plaintiffs' case consisted primarily of proof that blacks in Indianapolis were concentrated in a ghetto area, that they had special interests in certain issues, that a disproportionately low percentage of legislators in the past ten years came from the ghetto, and that there was a high degree of political party control over the nomination of candidates and the voting patterns of the legislative

delegation. On the basis of this evidence the Supreme Court concluded:

> "We are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned them."

403 U.S. at 160. Essentially, the Supreme Court determined that the plaintiffs in *Whitcomb* only established that the failure of the black ghetto to have legislative seats in proportion to its population was solely the result of political defeat at the polls rather than a built-in bias against blacks. Indeed, the Court held that

> "the fact that a number of ghetto residents who were legislators was not in proportion to ghetto population [does not] satisfactorily prove invidious discrimination *absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice.*"

29 L.Ed.2d at 379 (emphasis supplied).

Before directing our attention to the evidence in the instant case, we think it important to detail the salient features of the Texas electoral system and their impact upon the black minority. Under the legislative plan enacted by the Legislative Redistricting Board, Dallas County comprises a multi-member district with a population in excess of 1,300,000. Thus, Dallas County's multi-member district is approximately three times as large as a congressional district in Texas, almost twice the size of the multi-member district that the Supreme Court had before it in *Whitcomb v. Chavis*, and it has a population greater than that of fifteen

states." In addition, unlike the plurality system in Indiana, Texas has a strict "majority" requirement in the primary. Virtually unknown outside the South, the majority requirement has not escaped considerable criticism on both Fourteenth and Fifteenth Amendment grounds. *See Evers v. State Board of Election Commissioners,* S. D. Miss., 1971, 327 F.Supp. 640; *Boineau v. Thornton,* E.D. S.C. 1964, 235 F.Supp. 175. Whatever its constitutional status, it is clear that the majority system tends to strengthen the majority's ability to submerge a political or racial minority in a multi-member district. In combination with the majority requirement, there exists in the Texas political repertoire the "place" requirement. In essence, each candidate must limit his candidacy, in either a primary or a final election, to a particular place on the ballot. Since the place requirement means absolutely nothing in terms of residence, its ultimate effect is to highlight the racial element where it does exist. Furthermore, in multi-member districts in Texas there exists no provision for at-large candidates running from particular geographical subdistricts. Thus, in Dallas County it is entirely possible for each and every one of the district's eighteen representatives to reside in the same apartment complex. Finally, we note that unlike the State of Indiana, Texas has a rather colorful history of racial segregation. There exist innumerable instances, covering virtually the entire gamut of human relationships, in which the State has adopted and maintained an offi-

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[1]The Dallas County multi-member district has a greater population than the following states: Alaska (302,173); Delaware (548,104); Hawaii (769,913); Idaho (713,008); Maine (993,663); Montana (694,409); Nevada (488,738); New Hampshire (737,681); North Dakota (617,761); New Mexico (1,016,000); Rhode Island (949,723); South Dakota (666,257); Utah (1,059,273); Vermont (444,732); and Wyoming (332,416).

cial policy of racial discrimination against the Negro." Indeed, even the Negro's right to vote and to participate in the electoral process has not remained untouched by the State's policy." Therefore, it is not unlikely that Texas' use of multi-member districts, taken in the entirety of Texas electoral laws and of Texas history, unconstitutionally infringes the voting rights of racial and political minorities in all Texas cities that are districted as multi-member. However, we find it unnecessary at this time to so hold, for we conclude that the Dallas plaintiffs have also shown that

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"See, e.g., Beal v. Holcombe, 1951, 193 F.2d 384 (city ordinance setting aside public parks for the exclusive use of Negroes and providing that all other public parks were for the exclusive use of white people held unconstitutional); Tippins v. State, Tex.Cr.App. 1920, 217 S.W. 380 (holding that a complaint charging delinquency need not allege that a child is white or black because under the Texas Code of Criminal Procedure a separate place of confinement is provided for Negro delinquents); Strauss v. State, Tex.Cr.App. 1915, 173 S.W. 662 (upholding the constitutionality of a city ordinance making it unlawful for a white person and any Negro to have sexual intercourse with each other within the city limits); In Re Gomez, Tex.Civ.App. 1967, 424 S.W.2d 656 (holding unconstitutional a statute prohibiting the adoption of a white child by a Negro person or of a Negro child by a white person); Harvey v. Morgan, Tex.Civ.App. 1954 (criminal provision prohibiting any fistic combat, match, boxing, sparring or wrestling contest or exhibition between any person of the white race and any person of the Negro race held unconstitutional); O'Connor v. Dallas Cotton Exchange, Tex.Civ.App. 1941 (plaintiff held to allege a cause of action when his wife was wrongfully excluded from a passenger elevator set apart for whites and compelled to ride in an elevator set aside for Negroes).

"See, e.g., Nixon v. Herndon, 1926, 273 U.S. 536 (holding unconstitutional a Texas statute prohibiting Negroes from participating in the Democratic party primary election). Indeed, as recently as 1966 the State of Texas required the payment of a poll tax in order to vote. In striking down the poll tax requirement, a federal court found that the tax had originally been imposed in 1902 for the purpose of disenfranchising the Negro. United States v. State of Texas, W.D.Tex. 1966, 252 F.Supp. 234, 245, affirmed 384 U.S. 155.

the use of a multi-member district in Dallas County violates the equal protection clause in accordance with the standards of proof enunciated in *Whitcomb*.

In addition to the above factors, the Dallas plaintiffs have shown not only that the number of black community residents who have been legislators is not in proportion to ghetto residents, but also that the black community has been effectively excluded from participation in the Democratic primary selection process. As a factual matter, Negroes in Dallas County vote primarily for candidates of the Democratic party. Furthermore, we find that it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government (hereinafter referred to as the DCRG). Furthermore, it has been shown that white candidates endorsed by the DCRG in either a primary or general election can win in a county-wide race without appealing to the Negro vote. Essentially, the plaintiffs have shown that the DCRG, without the assistance of black community leaders, decides how many Negroes, if any, it will slate in the Democratic primary.[11] The DCRG then informs some black community leaders of its decision and requests that those leaders select the Negro candidate. It is significant that the DCRG makes its decision with respect to how many Negro candidates it will slate, and not how many candidates it will slate who are sympathetic to the problems and interests of the black community. Thus, the facts clearly show that the Negro community in Dallas County participates in

[11]Since the Reconstruction Era, there have been only two blacks from the Dallas County delegation to the Texas House of Representatives. In addition, these have been the only two blacks ever slated by the DCRG, and the first was not until 1966.

the selection of the Democratic primary candidates only in the recruiting process. But it is hardly adequate, for purposes of claiming effective participation, to say that the black community is consulted with respect to the sole black candidate placed on the DCRG slate. The requirement of effective participation can be answered only by showing that the interests of the black ghetto, like those of the white areas, are taken into consideration in the formulation of the entire slate. It is clear from the evidence in this case that such consideration never occurs. In essence, we find that the plaintiffs have shown that Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. If participation is to be labeled "effective" then it certainly must be a matter of right, and not a function of grace.

Finally, we think that the record evinces a recurring poor performance on the part of the Dallas County delegation concerning the representation of black interests in the Texas House of Representatives. State legislators from Dallas County, elected countywide, led the fight for segregation legislation during the decade of the 1950's. Indeed, the record reveals that during the late 1950's not one member of the Dallas County delegation voted against certain segregation measures introduced in the Texas House. Moreover, it has been shown that hostility toward the black community is still an integral part of Dallas County politics."

"The record in *Whitcomb* showed that Indiana is the millenial society where race plays no part in politics. The *Whitcomb* record showed the following: There were incidents of public and private discrimination in Indianapolis in the late 19th and early 20th centuries, but the record shows none after 1926; Indiana has had a civil rights law since 1885, and enacted a new civil rights law in 1969; the election results show a strong two-party system, with votes cast along political

As recently as 1970, the DCRG was relying upon racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community. So long as the organization that dominates the county-wide Democratic primary in Dallas County relies upon such a racial appeal to defeat black favored candidates, we think it highly unlikely that candidates elected on such a platform could seriously represent in the Texas Legislature the best interests of Dallas' black community.

We conclude that the Dallas plaintiffs have shown, in accordance with the standards laid down by the Supreme Court in the *Whitcomb* case, that a multi-member district in Dallas County tends to dilute or cancel out the vote of Dallas County's Negro minority. Accordingly, we hold the use of a multi-member district in Dallas County unconstitutional.

IV.

The United States Supreme Court has long recognized that Chicanos, as well as Blacks, require the protective intervention of the Federal Courts:

> "The State of Texas would have us hold that there are only two classes—White and Negro—within the contemplation of the Fourteenth Amendment. The decisions of this Court do not support this

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party lines rather than racial lines, both in the ghetto area and elsewhere; party nominations are made at primary elections, where those who have been "slated" by the party organization were invariably successful; the slating (at least for Democrats) is done at a convention of precinct chairmen, both black and white; the success of party nominees almost invariably depends upon the success of the ticket; blacks typically vote Democratic, and form a substantial part of the Democratic Party's strength; the predominance of party discipline over race is shown by the 1968 general elections in which three blacks were elected on the Republican ticket county-wide but finished well *behind* white Democratic opponents in the ghetto.

view.' See *Truax v. Raich*, 392 U.S. 33, *Takahashi v. Fish and Game Commission*, 334 U.S. 410. *Cf. Hirabayashi v. United States*, 320 U.S. 81,100: "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

* * * * *

"Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the law. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class' theory —that is, based upon differences between 'White' and Negro. *Hernandez v. Texas*, 347 U.S. 475, at 478 (1954)."

The existence of a recognizable Mexican-American minority is further evidenced by recent decisions of Federal Courts throughout the State. In *Pablo Puente v. City of Crystal City, Texas*, No. DR-70-CA-4 (April 3, 1970), the Court found that the real property ownership requirement incorporated in the Charter of Crystal City for candidates for city office was invidiously discriminatory against the Mexican-American Plaintiffs and their class and hence was unconstitutional.

Concerning the Corpus Christi Independent School District in Nueces County, Texas, a Court ruled that

Texas was segregating Mexican-American students (which were found to constitute a readily identifiable ethnic-minority group or class) in the public schools on the basis of race, color, or national origin. *Cisneros v. Corpus Christi Independent School District* (S.D. Tex. 1970) 324 F.Supp. 599.

The Court of Appeals for the Fifth Circuit has held that the record supported allegations that there had been discrimination in the selection of the Grand Jury in El Paso County, Texas that indicted the Mexican-American petitioner and that the State of Texas had failed to recognize the right of Mexican-American defendants to protest exclusion or under-representation of Mexican-Americans in the composition of Grand Jury and Petit Jury venires. *Muniz v. Beto* (5th Cir. 1970) 434 F.2d 697.

The most recent decision in this area resulted from a suit brought by Mexican-American Plaintiffs in the Edgewood Independent School District in Bexar County, Texas, a district of near-total Mexican-American enrollment. The Court found the Texas public school financing structure unconstitutional on grounds that the quality of a student's education should relate to the wealth of the State as a whole and not to an individual district's real property tax reserve. *Rodriguez v. San Antonio Independent School District* (W.D. Tex., Dec. 23, 1971) Civil Action No. 68-175-SA. Moreover, as stated in a scholarly note by Gerald M. Birnberg in the University of Texas Law Review, 49 Texas L. Rev. 337, 338 (1971), "The conclusion that ethnic isolation of Mexican-Americans in the public schools is unlawful should not be surprising, since that principle has long been established in Texas law." See generally *Jesus Salvatierra v. Inhabitants of Del Rio Independent School District*, 33 S.W. 2d 790 (Tex.

Civ. App. 1930), *appeal dismissed, w.o.j., and cert. denied*, 284 U.S. 580 (1931); *Delgado v. Bastrop Independent School District*, Civ. No. 388 (W.D. Tex. June 15, 1948); *Hernandez v. Driscoll Consolidated Independent School District*, 2 Race Rel. L. Rev. 329 (S.D. Tex. January 11, 1957). 49 Tex. L. Rev. 337 (1971): In *Cisneros*, supra, at 607, 608, Judge Seals said:

> "... [I] It is clear to this Court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic minority in the United States, and especially so in the Southwest [and] in Texas ... This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course their Spanish surnames. And if there were any doubt in this court's mind, this court could take notice, which it does, of the congressional enactments, government studies and commissions on this problem."

324 F. Supp. at 607-608.

Because of long-standing educational, social, legal, economic, political and other widespread and prevelant restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.

In the words of a recent Texas Federal Court decision,

> "Mexican-American students in the State of Texas are a cognizable ethnic group and, hence, many

avail themselves of the protections afforded under the Fourteenth Amendment and under Title VI and the Mexican-American students in the Del Rio area have been subjected, over the years, to unequal treatment with respect to the educational opportunities afforded them and are, thus, part of a so-called *de jure* dual school system based upon separation of students of different ethnic origins." *United States v. Texas,* Civil Action No. 5281 (E.D. Tex. July 13, 1971)[18]

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[18]In the following language from Judge Roth's opinion in *Bradley v. Milliken*, Civil Action No. 35257 (E.D. Mich. Sept. 27, 1971), Bexar County and Mexican-Americans may readily be substituted, respectively, for City of Detroit and Blacks:

"The City of Detroit is a community generally divided by racial lines. Residential segregation within the city and throughout the larger metropolitan area is substantial, pervasive and of long standing. Black citizens are located in separate and distinct areas within the city and are not generally to be found in the suburbs. While the racially unrestricted choice of black persons and economic factors may have played some part in the development of this pattern of residential segregation, it is, in the main, the result of past and present practices and customs of racial discrimination, both public and private, which have and do restrict the housing opportunities of black people * * * *

"Governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area * * * * The policies pursued by both government and private persons and agencies have a continuing and present effect upon the complexion of the community—as we know, the choice of a residence is a relatively infrequent affair. For many years FHA and VA openly advised and advocated the maintenance of 'harmonious' neighborhoods, *i.e.*, racially and economically harmonious. The conditions created continue. While it would be unfair to charge the present defendants with what other governmental officers or agencies have done, it can be said that the actions or the failure to act by the responsible school authorities, both city and state, were linked to that of these other governmental units. When we speak of governmental action we should not view the different agencies as a collection of unrelated units. Perhaps the most that can be said is that all of them, includ-

Chief Judge Brown has said that "[I]n the problem of racial discrimination, statistics often tell much, and courts listen." *Alabama v. United States*, 304 F.2d 583, 586 (Fifth Cir. 1962)

Bexar County, Texas contains areas of substantial Mexican-American concentration which are clearly de-

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ing the school authorities, are, in part, responsible for the segregated condition which exists. And we note that just as there is an interaction between residential patterns and the racial composition of the schools, so there is a corresponding effect on the residential pattern by the racial composition of the schools.

"As we assay the principles essential to a finding of de jure segregation, as outlined in rulings of the United States Supreme Court, they are:

1. The State, through its officers and agencies, and usually, the school administration, must have taken some action or actions with a purpose of segregation.
2. This action or these actions must have created or aggravated segregation in the schools in question.
3. A current condition of segregation exists. We find these tests to have been met in this case. We recognize that causation in the case before us is both several and comparative. The principal causes undeniably have been population movement and housing patterns, but state and local governmental actions, including school board actions, have played a substantial role in promoting segregation. It is, the Court believes, unfortunate that we cannot deal with public school segregation on a no-fault basis, for if racial segregation in our public schools is an evil, then it should make no difference whether we classify it de jure or de facto. Our objective, logically, it seems to us, should be to remedy a condition which we believe needs correction. In the most realistic sense, if fault or blame must be found it is that of the community as a whole, including, of course, the black components. We need not minimize the effect of the actions of federal, state and local governmental officers and agencies, and the actions of loaning institutions and real estate firms, in the establishment and maintenance of segregated residential patterns—which lead to school segregation—to observe that blacks, like ethnic groups in the past, have tended to separate from the larger group and associate together. The ghetto is at once both a place of confinement and a refuge. There is enough blame for everyone to share."

fined geographically and which have the characteristics of slum areas due to common adverse conditions relating to family income, housing, educational attainment and other matters. This is particularly true of the area known as the West Side in the City of San Antonio, Texas.

The record reveals that the predominately Mexican-American section of San Antonio (50% or greater) is included within 28 contiguous census tracts. In this area, also known as the Barrio, the average resident lives in the most seriously straitened and deprived circumstances. Mexican - Americans ("Chicanos") make up 78.54% of the population of the Barrio, which is 23.78% of the total population of Bexar County's population of 830,460. The Barrio includes 47.8% of the housing units in Bexar County valued at less than $5,000. Only 00.67% of the units valued at $50,000 or more are located in the area. The average home cost in Bexar County is $13,500, whereas in the Barrio, the average cost is $8,807.14. These census tracts also contain 58.5% of the total dwelling units lacking some or all plumbing units, at an average contract rental of $51.86, as opposed to $86.00 for the county as a whole.

The 1960 census figures also disclose that the Barrio at that time included 65.43% of the Bexar County population who had never attended school and only 5.26% of the county's college graduates. Also, it embraced 73.04% of the Bexar County families with median incomes under $5,000, as contrasted with only 2.18% of the Bexar County families with median income over $25,000. Although Barrio laborers made up 29.55% of the county's labor force, 46.33% of the Bexar County unemployed work force lived there. (The 1970 census figures in this regard were not available at the time of trial.)

It has been suggested that because Chicanos constitute about half the population of Bexar County, they cannot be a politically deprived ethnic minority. Such a suggestion misconceives the meaning of the word "minority." In the context of the Constitution's guarantee of equal protection, "minority" does not have a merely numerical denotation; rather it refers to an identifiable and specially disadvantaged group. That Mexican-Americans in Texas are such a group is well-established. With regard to Mexican-American children, one Court recently held that:

> "these students react to or are affected by a given stimulus—the Anglo-oriented educational program such as that maintained in the former Del Rio Independent School District—in a similar and predictable manner and, in the opinion of a recognized expert, this reaction is based almost entirely on common characteristics which, incidentally, may be traced to their common and distinct ancestry." *U.S. v. Texas*, Civil Action No. 5281 (E.D. Tex. July, 1971)

Consequently, in addition to the appalling conditions of poverty and its concomitants, most Chicano children in Texas face an often insurmountable cultural disorientation. The fact that they are reared in a subculture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems. A "Report of the United State Commission on Civil Rights, March, 1970" (Plaintiff's exhibit, BI-12, p. 66) states that:

> "It is common in the Southwest, moreover, to find Mexican-Americans who speak Spanish in the home, with friends, on social occasions, and at work among other Mexican-Americans; they use English only as a second language when necessary. Many Mexican-Americans have enough familiarity with

English to get along, but have more difficulty than the average layman in understanding Courtroom proceedings and legal matters."

In the "Summary" of this Report (Plaintiff's exhibit BI-13, p. 16) the Commission concludes that Mexican-Americans in the Southwest have a language disability that seriously interferes with their relations with agencies and individuals responsible for the administration of justice. This results in an inability to communicate with police officers, probation and parole officers, their own attorneys in civil and criminal matters, and in other legal proceedings. Certainly, this language barrier is a *raison d'etre* for the Mexican-Americans label: "The Invisible Minority."

There is no aspect of human endeavor, in general and of American life in particular, in which the ability to read, write and understand a language is more important than politics. It should come as no surprise, then, to discover that Mexican-American participation in the political process of Bexar County is markedly deficient. Of course, there are many types of political alienation, and mere lack of participation by a particular group in the political process does not necessitate corrective action. But, just as Courts have drawn appropriate and necessary inferences from the absence of Mexican-Americans from jury venires, *Hernandez and Muniz*, supra, so they must regarding political participation.

There can be no doubt that lack of political participation by Texas Chicanos is affected by a cultural incompatability which has been fostered by a deficient educational system. If this court ignores the reason for the minimal impact of Mexican-Americans on Bexar County legislative elections, "it will prove that justice

is both blind and deaf." *Sims v. Baggett*, supra, at 109. See also *Sims v. Ames*, supra.

This cultural and language impediment, conjoined with the poll tax and the most restrictive voter registration procedures in the nation[11] have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.

In Bexar County, Texas securing the Democratic Party nomination for the Texas House of Representatives has been tantamount to election since no Republican has been elected to said House from Bexar County from 1880 to the present. In Bexar County, there is presently no formalized process by which the Democratic Party slates candidates in party primary elections for the Texas House of Representatives. The population of the West Side of San Antonio tends to vote overwhelmingly for Mexican-American candidates when running against Anglo-Americans in party primary or special elections, to split when Mexican-Americans run against each other, and to support the Democratic Party nominee regardless of ethnic background in the general elections. The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates except in a general election when they tend to vote for the Democratic Party nominee whoever he may be although in a somewhat smaller proportion than they vote for Anglo-American candidates.

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[11]See *Breare v. Smith*, 321 F. Supp. 1100 (S. D. Tex. 1971) See also *Garza v. Preston Smith*, Civil Action No. SA-70-CA-169 (W.D. Tex., Oct. 16, 1971) in which the Court declared unconstitutional Articles 5.05(15) and 8.13 of the Texas Election Code as violative of the Equal Protection clause of the Fourteenth Amendment insofar as said articles forbade assistance to illiterate voters while granting such assistance to physically disabled and blind voters.

The cost of conducting electoral campaigns in countywide races in Bexar County is so excessive that this factor alone has inhibited the recruitment and nomination or election of Mexican-American candidates for the Texas House of Representatives. Reports of election expenses reveal that Anglo-American candidates for State Representative spent two to three times as much as Chicano candidates, and that contributions were heavily in favor of Anglo candidates.

Only four residents of the Barrio have run for the Texas House of Representatives since 1880, one in 1900 and the remainder since 1960. Of this number, two were Chicanos, one a Black, and the other an Anglo-American. And since 1880 only a total of five Mexican-Americans have served in the Texas Legislature from Bexar County.

An Anglo member of the House of Representatives from Bexar County was unable to identify any piece of legislation sponsored by any member of the Bexar County delegation at the last session of the Legislature to relieve or remedy the adverse conditions extant in the West Side. Of course, the Court in *Whitcomb*, supra, stated:

> "Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had *less opportunity* than did other Marion County residents *to participate* in the political process and to elect legislators of their choice." (Emphasis added.)

Naturally, this Court fully accepts Justice White's evaluation, but we note that he did correctly indicate that such facts, taken in conjunction with others, would be persuasive. It is not suggested that minorities have

a constitutional right to elect candidates of their own race, but elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines. All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.

In *Kramer*, supra, at 626, the Court held that:

> "Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials, undermines the legitimacy of representative government."

Just as the Court has invalidated "grandfather clauses," *Lane v. Wilson*, 307 U.S. 268 at 275 ( ), so it has disapproved "the ghost of past malapportionment," *Burns*, supra, at ——. Likewise, when a minority group is invidiously disadvantaged by the concomitance of poverty, past and continuing discrimination, a restrictive electoral system, and a peculiar districting scheme," which gives it "less opportunity" to participate successfully, the Court will void such an apportionment scheme. *Cf. Hadley*, supra, at 57. See generally *Gaston v. United States*, 395 U.S. 285 (1969). It must be recognized that the right to vote may be abridged as easily by making its exercise excessively difficult as by prohibiting its exercise entirely. The Constitution forbids "sophisticated as well as single-

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"The overlay of a designated, but not geographically based, place system, which it is generally conceded enables politically active majorities to gang up on politically inactive minorities by eliminating the single-shot voting possible in the usual at large system—on a majority run-off requirement in the multi-member districts. See Speech by Preston W. Edsall,
, and Roy E. Young, *The Place System in Texas Elections.*

minded modes of discrimination." *Gomillion v. Lightfoot*, 364 U.S. 339 at 342 (1960). *Cf. Terry v. Adams*, 345 U.S. 461 (1953).

The principal distinctions between the Dallas minority, the blacks, and the San Antonio minority, the Mexican-Americans, are in two areas: first, the Mexican-Americans of San Antonio are in plurality in terms of their numerical percentage of the population of Bexar County, and second, the Mexican-Americans of San Antonio register and vote at very low rates, approximately 30%. It has been argued that the facts of numerical majority and of low voting participation indicates that the Mexican-Americans are not entitled to constitutional relief, since they "could" do very well in multi-member district elections in Bexar County. We reject those arguments.

Whitcomb speaks of a "minority," and we see no need to limit that to numerical minority. In fact, "minority" has traditionally been used in Civil Rights cases to denote a racial or social group of people, not a numerical percentage. Therefore, the Mexican-Americans of San Antonio are not read out of *Whitcomb* simply because their numbers may predominate over those of the Anglos. They still fall within the rationales of *Whitcomb*.

In addition, we draw very different conclusions than does the State from the fact that the Mexican-Americans register and vote in such low numbers. The State uses those facts to argue that the Mexican-Americans need political organization, not redistricting. We use those facts in the context of the other facts regarding the Mexican-Americans of San Antonio that we have previously discussed. And we conclude that the *reason* that the voter participation among the Mexican-Americans is so low is that their voting patterns were estab-

lished under precisely the same sort of discriminatory State actions that we have already found both relevant and condemnatory with regard to the Dallas Blacks. The fact that some of those laws have been changed within the past few years or months does not answer or offset the fact that the voting patterns remain firm. Because they were denied access to the political processes through years of discrimination, the Mexican-Americans do not now register and vote in overwhelming numbers. We are not at all surprised at that result. Nor do we feel constitutionally able to respond, as does the State, that the Mexican-Americans should be left to the tool of political organization in order to remedy their electoral situation in San Antonio and to exert more influence in multi-member elections in Bexar County. The voting patterns and the language difficulties, which we have already concluded were caused or abetted by State action, have made the process of organization extremely onerous, if not illusive.

There is no constitutional requirement that the Mexican-Americans go through the decades of organization and heartache that preceded the black Civil Rights movement and the resulting increase in black participation in the political processes. Quite the contrary, while State action unquestionably caused or contributed substantially to the low voter participation of the Mexican-Americans in San Antonio, the remedying of State action is both appropriate and constitutionally compelled. The fact that the State action at issue here, the apportionment of Bexar County, did not "cause" the low voter participation is questionable argument and an irrelevant one. Because of the continued and continuing discriminations against Mexican-Americans in Bexar County, they are effectively removed from the political processes of Bexar in violation of all the

Whitcomb standards, whatever their absolute numbers may total in that County.

Single-member representation in Bexar is as constitutionally compelled as is single-member representation in Dallas, on the basis of *Whitcomb*, although for somewhat different rationale and under somewhat different circumstances. Single-member districts in San Antonio will obviously be of benefit in remedying the effects of past and present discrimination against Mexican-Americans. If the voting percentages remain at 30% in the Mexican-American areas, for a short while after single-member districting, at least the Mexican-Americans will have representation of their interests in the Texas House. Moreover, we are also of the opinion that the opportunity to participate effectively in the political process will greatly encourage the voting percentages in the Mexican-American areas of Bexar.

Again, we are not to be understood as saying, and indeed specifically disavow, any intention of implying that

> "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represent a majority living in an area sufficiently compact to constitute a single member district." *Whitcomb*, supra, at ——.

No political, racial or other interest group has any constiutional right to be successful in its political activities. However, a State may not design a system that deprives such groups of a reasonable chance to be successful.

V.

The San Antonio Republicans assert that the State Senate Districts in Bexar County have been unlaw-

fully gerrymandered. Specifically, they argue that the legislative redistricting board designed Senatorial Districts 19, 21, and 26 for the purpose of minimizing the Republicans' political clout. We are unable to agree with this contention.

In Bexar County the three state senatorial posts are presently filled by two Anglos and one Mexican-American. Under the board's redistricting plan, Senatorial District 21 combines approximately 110,000 people from the northern portion of Bexar County with approximately 250,000 people from rural counties north, west, and south of Bexar County. The State demonstrated that a division was necessary in order to achieve numerical equality in the various senatorial districts. While the San Antonio Republicans do not challenge the State's quest for population equality among the various senatorial districts, they do object to the method employed by the State in adhering to the one-man, one-vote principle. Essentially, the Republicans in San Antonio claim that those 110,000 bodies combined with other South Texas counties in Senatorial District 21 should have been extricated from the southern portion of Bexar County.

This Court is unable to conclude that there is some constitutional preference for a district shaped like a horseshoe as opposed to one shaped like a doughnut. Indeed, there seems little to dictate a choice between what was done and what could have been done concerning the senatorial districts in Bexar County. The State has shown that its choice is relatively consistent with traditional redistricting criteria. All three of the senatorial districts representing at least a portion of Bexar County follow the principles of contiguity. In addition, these three districts are relatively compact, and the fact that another redistricting plan might have

created districts which were arguably more compact is not sufficient to justify judicial denunciation of the existing plan. Accordingly, we conclude that the San Antonio Republicans have failed to prove an unlawful gerrymander with respect to the senatorial districts in Bexar County, Texas.

VI.

The plaintiff in Harris County contends that the state redistricting board has districted Harris County's senatorial seats in such a way that the effect is to minimize or dilute Harris County's black vote. In addition, the Harris County plaintiff alleges that the intent of the redistricting board was to dilute the black vote.

Of course, whenever a single-member districting scheme is employed in a metropolitan area, it is essential that some divisions be made. The Supreme Court cases are unclear concerning the question of whether it is the *effect* of a redistricting scheme or the *intent* of the redistricting body that controls the Fourteenth Amendment inquiries of a judicial tribunal. *See generally, Palmer v. Thompson*, 1971, —U.S.—, 91 S.Ct. —, 29 L.Ed. 2d 438. We feel compelled to conclude from *Whitcomb* that effect—that is, the established effect of a lesser impact on black voters under one scheme as contrasted with another—is not sufficient alone to invalidate a districting scheme under the Fourteenth Amendment. And intent—if by intent one means only an established, specific purpose—is usually very difficult to demonstrate; racial motives are rarely stated openly nowadays. Of course, a court may draw differences in *degree* between the effects of a districting scheme, or a court may *infer* intent from particular effects within a *congeries* of historical circumstance.

But in such a situation whether a court uses "effect" or "intent" as the basis for judicial inquiry, we believe that a court must find, before concluding that a single-member districting scheme violates the Fourteenth Amendment, that the effects are indeed substantial, if not egregious. From the record presented to this Court a majority is simply unable to conclude that even the effect of the challenged redistricting scheme in Harris County will be to dilute the votes of the black minority. The racial composition of the various districts in Houston has changed very little, if at all. Indeed, State Senator Barbara Jordan, a black, testified that she would not concede that she could not win from the new senatorial district because she believed that she could appeal to a broad base of the voters. In addition, to remedy the alleged racial effect of the board's plan, we have been offered one plan that openly "gerrymanders" (in the historical sense of that word) Harris County so as to maximize black voting clout, a proposal strictly forbidden by the Fourteenth Amendment, *see Wright v. Rockefeller*, 1964, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, (Douglas, J., dissenting), and another plan which, if acceptable in other respects, would increase the black percentage in one district by only five percentage points.

Furthermore, we cannot read invidious racial intent by the legislative redistricting board into the fact that the board may have taken the racial composition of the various districts into consideration in drawing its plan. It appears to a majority of this Court that, in order *not* to dilute the votes of a racial minority as required by the Fourteenth Amendment, *see Whitcomb v. Chavis, supra*; *Fortson v. Dorsey, supra*; *Burns v. Richardson, supra.* the body charged with drawing district lines is within its rights to have before it information on racial composition.

Absent preponderating evidence, this Court can only conclude that the plaintiff in the Harris County case has failed to show that Harris County's single-member senatorial districts either operate or were designed to dilute the vote of that county's black minority.

VII.

This Court concludes that the apportionment plan for the State of Texas is unconstitutional as unjustifiably remote from the ideal of "one man, one vote," and that the multi-member districting schemes for the House of Representatives as they relate specifically to Dallas and to Bexar Counties are unconstitutional in that they dilute the votes of racial minorities. The panel does not feel compelled to reach the question of the alleged dilution of "political" elements in the apportionment of the House of Representatives as raised by the Republicans of Dallas and Bexar Counties on the ground that the interests of and the relief asked by the Republicans are automatically subsumed in the relief granted to Dallas and Bexar Counties in behalf of the black and Mexican-American minorities. The Court is unanimously of the opinion that the Senate districting scheme for Bexar County does not unconstitutionally dilute the votes of any political faction or party. The majority is unable to conclude that the black votes of Harris County have been unconstitutionally diluted.

The Supreme Court and the Federal Judiciary have entered the field of legislative apportionment only with hesitation and only to correct constitutional defects. Apportionment remains essentially a legislative function, and this Court feels neither required nor inclined to assume that legislative duty at this point. Although we conclude that the legislative redistricting plan fashioned by the five-member redistricting board is consti-

tutionally infirm, our commitment to federalism is such that we remit to the State legislative processes the opportunity to perform its functions of redistricting. Therefore, the matter of redistricting the State in accordance with the constitutional guidelines explicated in this opinion is rendered for legislative consideration and resolution. See *Reynolds v. Sims*, supra." But while it is appropriate for the Federal Courts to enter the apportionment area with restraint, they cannot appropriately maintain a Job-like unquestioning and unswerving patience with the legislative processes in the realm of the Federal Constitution." The next regular session of the Texas Legislature will convene in January of 1973. If the legislature has not acted pursuant to constitutional guidelines by July 1, 1973, this Court will feel compelled by the Fourteenth Amendment and the evolving law of apportionment to redistrict the State itself. See *Sims v. Amos*, supra.

It is established law in this area that a Court may act either temporarily or permanently and that it may act to remedy only specific sections of a State apportionment plan. See *Reynolds v. Sims*, supra; *Whitcomb v. Chavis*, supra. In particular, we conclude that this Court should act immediately on those areas of a State apportionment plan which it finds to be egregiously out of line with constitutional requirements. See *Wells v. Rockefeller*, supra. This requirement of immediate

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"We should note that this Court has been offered a substitute plan by one of the plaintiffs which results in a total deviation for the State of less than 3.5%, while cutting only 28 county lines. Although that plan may be defective in other ways, which we have neither studied conclusively nor do we reach in this opinion, the proposed plan clearly indicates that a much closer proximation of *Reynolds* and *Swann* can be achieved.

"See *Kilgarlin v. Hill*, supra; *Smith v. Craddick*, supra; *Mauzy v. Redistricting Board*, supra.

action would arise primarily in the context of racial inequalities or hindrances. See *Connor v. Johnson*, supra; *Sims v. Amos*, supra.

This Court has concluded that particularly compelling constitutional infirmities have presented themselves in Dallas and Bexar Counties, founded in the context of racial inequalities and hindrances. Because the use of multi-member districting in Dallas and Bexar is the basis of our holdings of unconstitutionality and because a Federal Court engaged itself in the apportionment process must give preference to single-member districting, *Connor v. Johnson*, supra, this Court hereby adopts the single-member districting plans that are attached to this opinion as Exhibits A and B. These plans were adopted from among those presented to the Court by six different sources (with some adjustments by the Court) solely on the basis of the least population variance.[*] We are unanimously of the opinion that they fulfill the constitutional requirements of *Whitcomb* and of *Reynolds*.

This Court is also of the opinion that one of the equities of transition from multi-member districts in Dallas and Bexar Counties to single-member districts requires that, for the election to the Texas House of Representatives to be held during the year of 1972, no candidate shall be required to reside in the single-member district he seeks to represent; enforcement of and the requirement of the Texas Constitution so stating will be enjoined for the year of 1972. Such candidates must, however, reside in Dallas or Bexar Counties.

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[*]The total deviation of Exhibit A (Dallas) is 1.4% (1048); the total deviation of Exhibit B (Bexar) is 1.9% (1402).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
vs.
BEN BARNES, ET AL.

CIVIL ACTION NO. A-71-CA-143
DIANA REGESTER, ET AL.
vs.
BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144
JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.,
vs.
PRESTON SMITH, ET AL.

ORDER

[Filed, January 28, 1972]

Pursuant to the opinion entered this day in the above styled and numbered cause, the following mandate shall issue forthwith.

It is hereby ORDERED that unless the Legislature of the State of Texas on or before July 1, 1973, has adopted a plan to reapportion the legislative districts within the State in accordance with the constitutional guidelines set out in this opinion this Court will so reapportion the State of Texas.

It is further ORDERED that the counties of Dallas and Bexar are hereby reapportioned into single-member representative districts in conformance with attached Exhibits A and B, respectively.

It is further ORDERED that Article 3, Section 7 of the Constitution of the State of Texas, as pertains to the one-year district residence requirement for State Representatives is hereby suspended for those candidates for the Texas House of Representatives from Dallas and Bexar Counties in the 1972 primary, general and special elections. However, said Article 3, Section 7 shall remain in full force and effect as concerns those candidates for State Representative seeking election in Representative District 45, which has not been specifically reapportioned under this Order.

It is further ORDERED that the Secretary of State of the State of Texas adopt and implement any and all procedures necessary to properly effectuate the orders of this Court in conformance with this Opinion, the Texas Election Code, and the Constitution of the State of Texas.

The Court further ORDERS that any and all relief requested by the parties and not specially granted in this Order is hereby in all things DENIED.

It is further ORDERED that this judgment be considered, for purposes of appeal and otherwise, as a final judgment in this case, and that no stay of proceedings pending appeal will be granted by this Court.

IRVING L. GOLDBERG
Circuit Judge

WILLIAM WAYNE JUSTICE
District Judge

JOHN H. WOOD, JR.
District Judge

EXHIBIT A

DISTRICT 33A

PART OF DALLAS COUNTY:

Census Tract	Population
143 (Less Block 7 & 8)	16,923
144 (all except E.D. 69, 70, 82 and 82B)	8,090
145	7,142
146	6,353
147	7,157
148	3,366
149	2,564
150	5,424
151	7,681
152	8,995
TOTAL	73,695

DISTRICT 33B

PART OF DALLAS COUNTY:

Census Tract	Population
72 (Blocks 2 & 3 only)	2,702
97 (Blocks 3, 4 & 5 only)	4,470
99	3,236
136.01	1,649
137.01	4,561
137.02	7,303
137.03	6,797
137.04	52
137.05	39
138.01	284
138.02	9,623
139	8,439
140.01	4,283
140.02	314
141.01	1,735
141.02	391
141.03	44
141.04	7,890
142	3,873
143 (Blocks 7 & 8 only)	6,027
TOTAL	73,712

EXHIBIT A

DISTRICT 33C

PART OF DALLAS COUNTY:

Census Tract	Population
4.01	2,893
4.02	5,647
4.03	6,509
5	4,582
16	6,007
17.01	316
17.02	3,103
18	2,657
19	1,447
21	200
22.01	1,669
22.02	2,265
23	2,553
25 (Blocks 3 & 4 only)	2,304
28	2,523
29	3,778
30	649
31.01	2,465
31.02	56
32.01	377
33	3,277
36 (Block 1 only)	710
71.02	7,662
100	3,665
102	6,511
TOTAL	78,825

DISTRICT 33D

PART OF DALLAS COUNTY:

Census Tract	Population
181.01	5,624
181.02	2,566
181.03	5,418
182	12,170
183	7,842
184	7,635
186	4,305
187	4,982
188	5,244
189	3,810
190.05 (less E.D. 220)	14,257
TOTAL	78,853

EXHIBIT A

DISTRICT 33E

PART OF DALLAS COUNTY:

Census Tract	Population
2.01 (Block 1)	1,050
3	3,616
6.01	5,727
6.02	7,897
10	4,799
71.01	2,339
73.01	2,462
73.02	4,049
75.02	469
79.01	7,769
193.01	2,549
193.02	6,667
194	3,753
195.01	6,194
195.02	4,335
196	2,597
197	2,716
198	4,820
TOTAL	73,808

DISTRICT 33F

PART OF DALLAS COUNTY:

Census Tract	Population
43	3,785
44	6,519
45	7,263
46	2,815
52	3,820
53	5,388
64	5,979
65	6,345
67	3,207
68	4,475
69	1,943
101	11,332
103	4,754
104	2,695
199	3,515
TOTAL	73,835

EXHIBIT A

DISTRICT 33G

PART OF DALLAS COUNTY:

Census Tract	Population
51 (less Block 1)	2,400
56	5,095
57	7,381
59.01	8,261
59.02	4,326
60.01	4,618
60.02	2,517
61	4,788
62	4,588
63.01	4,568
63.02	2,230
87.02 (Blocks 2, 3, 5, 6 & 7)	7,855
108	15,025
TOTAL	73,652

DISTRICT 33H

PART OF DALLAS COUNTY:

Census Tract	Population
116 (less Blocks 1 & 2)	6,046
165.02	6,632
165.03	6,605
165.04	590
165.05	2,274
166.01	3,400
166.02	4,189
166.03	3,241
166.04	538
167.02	5,819
168	6,107
169.01	3,189
169.02	1,876
169.03	3,035
169.04	555
170	7,957
171	4,412
172	3,347
173.01	3,894
TOTAL	73,706

EXHIBIT A

DISTRICT 33I

PART OF DALLAS COUNTY:

Census Tract	Population
120	2,536
121	242
126	5,374
127	8,366
173.02	2,686
174	3,923
175	2,600
176.01	6,615
176.02	2,559
177	10,056
178.01	5,265
178.02	8,436
179	5,595
180	8,446
181.04	901
TOTAL	73,600

DISTRICT 33J

PART OF DALLAS COUNTY:

Census Tract	Population
105	3,899
106	5,931
107	6,485
144 (E.D. 69, 70, 82 & 82B)	2,559
153.01	2,180
153.02	4,649
154	7,807
155	3,455
156	4,494
157	3,304
158	2,617
159	2,496
160	6,215
161	2,953
162	6,543
163	1,750
164	4,393
165.01	2,092
TOTAL	73,822

EXHIBIT A

DISTRICT 33K

PART OF DALLAS COUNTY

Census Tract	Population
7.01	3,363
7.02	2,743
8	4,787
9	3,123
11.01	4,132
11.02	2,401
12	4,727
13.01	1,956
13.02	5,092
14	3,803
15.01	6,863
15.02	3,925
24	2,440
25 (less Blocks 3 & 4)	2,433
26	1,798
27.01	7,267
27.02	4,914
38 (less Block 5)	3,385
39.01	4,583
TOTAL	73,735

DISTRICT 33L

PART OF DALLAS COUNTY:

Census Tract	Population
84	6,263
85	3,299
90.01	1,186
90.02	4,250
91.01	5,410
91.02	8,818
92.01	5,429
92.02	4,747
93.01	3,671
93.02	7,429
115	6,782
116 (Blocks 1 & 2)	1,922
117	7,818
118	3,536
119	3,123
TOTAL	73,683

EXHIBIT A

DISTRICT 33M

PART OF DALLAS COUNTY:

Census Tract	Population
1	3,795
2.01 (less Block 1)	2,085
2.02	3,908
79.02 (less Block 6)	5,078
80	5,920
81	6,979
82	5,064
83	1,650
122.01	12,213
122.02	4,249
123	7,048
124	6,860
125	8,956
TOTAL	73,805

DISTRICT 33N

PART OF DALLAS COUNTY:

Census Tract	Population
36 (except Block 1)	1,124
37	5,855
38 (Block Group 5 only)	1,490
39.02	3,756
40	3,794
86	4,121
87.01	4,979
87.02 (all except Blocks 2,3,5,6 & 7)	5,619
109	1,327
110	10,217
111.01	1,933
111.02	11,667
112	3,571
113	4,844
114.01	4,507
114.02	1,740
167.01	3,237
TOTAL	73,781

EXHIBIT A

DISTRICT 33O

PART OF DALLAS COUNTY:

Census Tract		Population
20		6,306
32.02		209
33		1,854
34		6,950
41		3,585
42		4,638
47		3,134
48		3,718
49		7,597
50		3,035
51	(Block 1 only)	1,232
54		7,076
55		4,048
88		12,279
89		8,073
	TOTAL	73,734

DISTRICT 33P

PART OF DALLAS COUNTY:

Census Tract		Population
136.02		7,639
136.03	(Less Block 2)	8,332
190.01		937
190.02		4,085
190.04		4,295
190.05	(E.D. 220 only)	369
190.06		216
190.07		895
191		6,106
192.01		4,718
192.02		5,058
192.03		5,713
192.04		6,482
192.05		3,065
192.06		6,241
192.07		9,555
	TOTAL	73,706

EXHIBIT A

DISTRICT 33Q

PART OF DALLAS COUNTY:

Census Tract	Population
77	5,795
78.01	894
78.02	6,633
78.03	7,107
79.02 (Block 6 only)	824
128	9,238
129	5,330
130.01	13,877
130.02	9,724
131	7,755
133	2,057
185.01	3,718
185.02	92
190.03	553
TOTAL	73,597

DISTRICT 33R

PART OF DALLAS COUNTY:

Census Tract	Population
72 (less Blocks 2 & 3)	2,101
74	1,697
75.01	739
76.01	2,302
76.02	812
76.03	842
76.04	3,693
94	7,036
95	2,492
96.01	12,178
96.02	8,696
96.03	4,756
96.04	2,205
97 (less Blocks 3, 4, & 5)	4,237
98	9,262
132	2,217
134.01	1,165
134.02	1,504
135	2,898
136.03 (Block 2 only)	2,940
TOTAL	73,772

LEGEND

Exhibit A District No.	Map District No.
33A	1
33B	2
33C	3
33D	4
33E	5
33F	6
33G	7
33H	8
33I	9
33J	10
33K	11
33L	12
33M	13
33N	14
33O	15
33P	16
33Q	17
33R	18

EXHIBIT B

DISTRICT 57A

PART OF BEXAR COUNTY:

Census Tract	Population
1511	8,325
1521	1,513
1608	4
1609	8,419
1610	3,799
1611	4,914
1613	1,393
1614	22,867
1615	10,475
1617	1,042
1618	4,830
1619	3,439
1620	4,323
TOTAL	75,343

DISTRICT 57B

PART OF BEXAR COUNTY:

Census Tract	Population
1411	7,524
1415	1,219
1416	256
1505	11,251
1506	5,515
1507	6,116
1508	1,428
1509	6,314
1510	3,985
1512	2,622
1513	6,446
1514	4,276
1515	2,605
1516	6,663
1517	6,837
1518	1,573
1520	353
1612	568
TOTAL	75,551

EXHIBIT B

DISTRICT 57C

PART OF BEXAR COUNTY:

Census Tract	Population
1205	14,257
1213	3,534
1214	5,316
1215	655
1216	5,938
1217	5,054
1310	5,376
1312	2,384
1313	5,955
1314	505
1315	3,581
1316	2,475
1317	5,329
1318	3,078
1413	2,158
1417	1,362
1418	1,884
1419	1,717
1519	3,191
1522	1,992
TOTAL	75,741

DISTRICT 57D

PART OF BEXAR COUNTY:

Census Tract	Population
1104	2,674
1308	3,999
1311	4,112
1401	2,237
1402	3,739
1403	3,143
1404	3,586
1405	3,682
1406	2,337
1407	3,904
1408	5,459
1409	1,941
1410	2,584
1412	6,925
1414	10,097
1501	6,959
1502	1,696
1503	5,674
TOTAL	74,753

EXHIBIT B

DISTRICT 57E

PART OF BEXAR COUNTY:

Census Tract	Population
1101	3,275
1102	1,816
1103	6,290
1109	1,332
1110	3,586
1201	10,561
1202	5,523
1301	5,508
1302	2,181
1304	8,572
1305	7,539
1306	5,846
1307	3,490
1308	5,643
1309	3,695
TOTAL	74,857

DISTRICT 57F

PART OF BEXAR COUNTY:

Census Tract	Population
1203	6,933
1204	5,225
1206	6,023
1207	8,017
1208	7,592
1209	4,970
1210	5,150
1211	2,871
1212	6,755
1218	1,108
1219	52
1908	2,250
1909	10,703
1913	3,588
1914	1,119
1917	3,481
TOTAL	75,837

EXHIBIT B

DISTRICT 57G

PART OF BEXAR COUNTY:

Census Tract	Population
1802	8,245
1809	15,137
1810	3,502
1906	10,554
1907	3,903
1910	17,287
1911	5,311
1912	10,534
TOTAL	74,473

DISTRICT 57H

PART OF BEXAR COUNTY:

Census Tract	Population
1616	4,339
1714	4,558
1717	4,944
1718	11,929
1719	3,921
1805	5,621
1806	8,933
1807	5,621
1808	2,504
1811	4,507
1812	2,390
1813	3,197
1814	395
1815	4,366
1816	2,996
1817	1,239
1818	2,246
1819	858
1915	1,311
TOTAL	75,875

EXHIBIT B

DISTRICT 57I

PART OF BEXAR COUNTY:

Census Tract	Population
1607	8,779
1706	5,200
1707	6,881
1708	1,749
1709	8,354
1710	8,001
1711	4,898
1712	4,375
1713	8,236
1715	8,738
1716	3,158
1803	4,255
1804	2,189
TOTAL	74,813

DISTRICT 57J

PART OF BEXAR COUNTY:

Census Tract	Population
1105	5,431
1504	5,396
1601	9,450
1602	3,375
1603	5,881
1604	5,368
1605	11,516
1606	7,083
1702	10,850
1703	10,199
TOTAL	74,549

EXHIBIT B

DISTRICT 57K

PART OF BEXAR COUNTY:

Census Tract	Population
1106	7,002
1107	2,485
1108	3,520
1701	10,133
1704	12,481
1705	5,401
1801	8,261
1901	4,437
1902	6,100
1903	516
1904	4,143
1905	10,432
TOTAL	74,911

Exhibit-A.

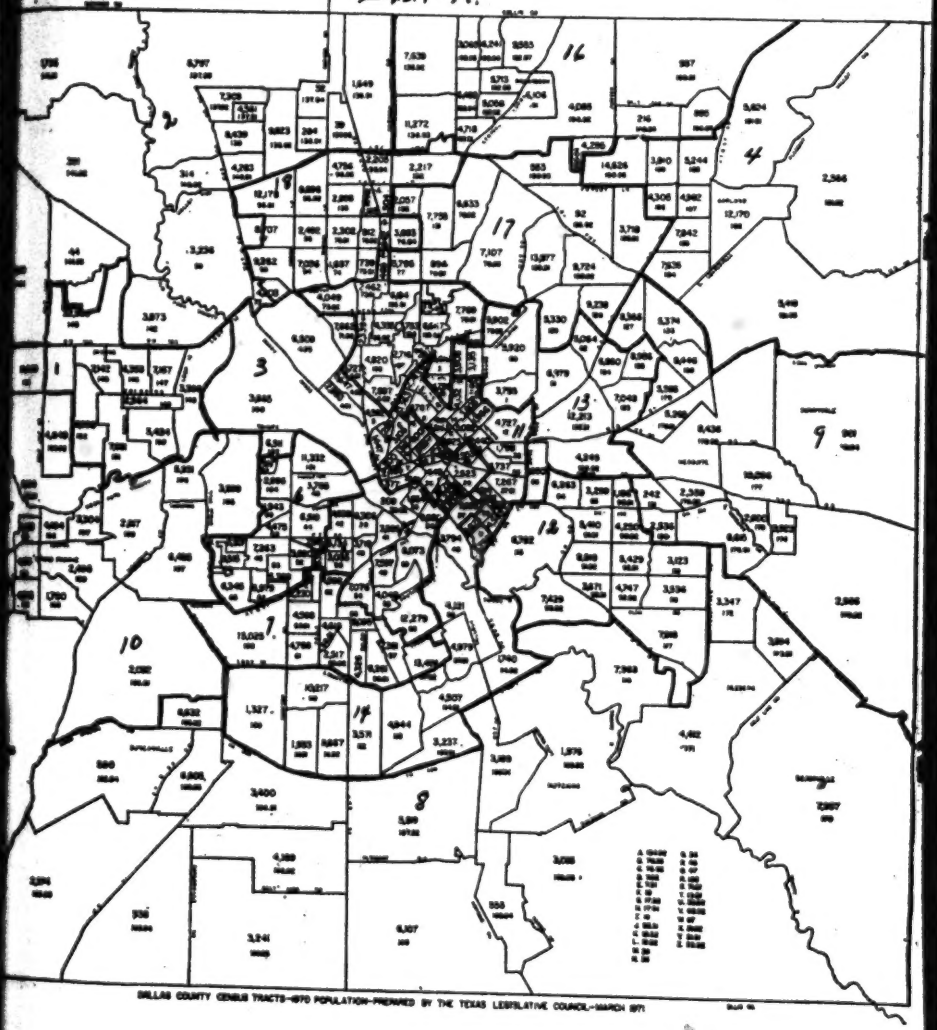
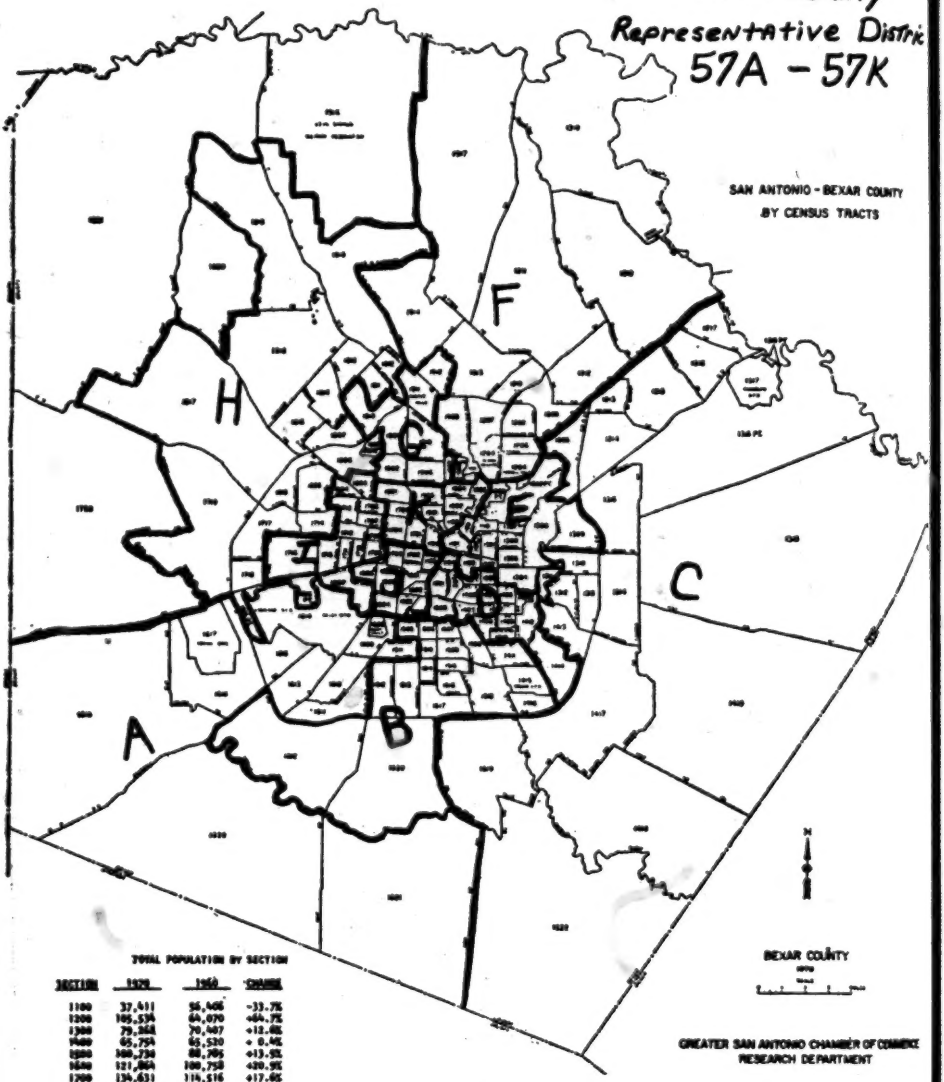

DALLAS COUNTY CENSUS TRACTS-1970 POPULATION-PREPARED BY THE TEXAS LEGISLATIVE COUNCIL-MARCH 1971

Exhibit B

Bexar County
Representative Districts
57A - 57K



TOTAL POPULATION BY SECTION

SECTION	1929	1950	CHANGE
1100	37,411	55,405	-33.7%
1200	105,534	69,070	+64.7%
1300	79,888	70,907	+12.6%
1400	65,759	65,520	+ 0.4%
1500	108,734	80,395	+43.5%
1600	121,864	100,758	+20.9%
1700	134,631	114,516	+17.6%
1800	99,539	58,337	+71.1%
1900	95,729	74,836	+27.9%
TOTAL	830,460	687,151	+20.9%

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
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CIVIL ACTION NO. A-71-CA-143
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vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.,
vs.
PRESTON SMITH, ET AL.

JUSTICE, District Judge, concurring in part and dissenting in part.

I concur in the court's opinion in all respects, with the exception of its refusal to grant relief in the action brought in the Houston Division of the Southern District of Texas by certain black voters of Harris County, challenging the Reapportionment Plan of the Texas Senate as that plan applies to Harris County. The plaintiffs contend: (1) That the State Senatorial Districts in Harris County, created by the Legislative Redistricting Board in 1971, were intentionally de-

signed by the Board to cancel, dilute or minimize the voting strength of blacks in Harris County; or, alternatively, (2) that the effect of the creation of such new State Senatorial Districts by the Board was to cancel, dilute or minimize the voting strength of such blacks.

Harris County is a metropolitan county dominated by the City of Houston. Two political experts, Professor Richard W. Murray of the University of Houston and Mr. Searcy Bracewell, a practicing attorney and registered lobbyist, testified to the political history and voting patterns of Harris County within recent years. The testimony of the experts coincided closely in many respects. Their testimony establishes that the dominant political party in Harris County is the Democratic Party. However, the western part of Houston and Harris County is a Republican stronghold. The Democratic Party in Harris County has a well defined cleavage between liberals and conservatives. The conservative faction of the Democratic Party controlled the single Harris County seat in the Texas Senate until 1966. However, since that date, the situation has changed to the extent that, in the present five-member delegation, there are four liberal Democrats and a Republican.

The evidence shows that the inner city of Houston, defined as the original fifty census tracts of the 1940 census, has a population of 431,000. Most of the residents of the inner city are black, but substantial numbers of Mexican-Americans and poor whites also reside there. Black voters in this area favor the Democratic Party overwhelmingly and support liberal Democrats to the same extent. Past voting patterns in the inner city demonstrate that, in legislative races, economic issues are paramount in the voters' minds, and that blacks and blue-collar voters ally themselves to elect

liberal legislators. Consequently, despite the fact that blacks constituted a minority in the four senatorial districts that included a part of the inner city under the 1965 redistricting plan, the political viewpoint of blacks—liberal Democrats—was held by all four Senators. Moreover, one of the Senators, the Honorable Barbara Jordan, is a black.

In the redistricting plan for Harris County adopted by the Legislative Redistricting Board in 1971, the core of the city was again divided among four senatorial districts. Professor Murray categorized the new districts, as follows:

District 11 contains a 37% black population. The prevailing white majority is predominately white collar middle class and upper middle class. However, the white voting pattern likely will be in favor of conservative Democrats and Republicans.

District 15 is 19% black. Included in its eastern part, near the heart of the city, are some of the city's poorest neighborhoods. In the western part of the district, on the other hand, are located neighborhoods of middle and upper class whites. Among these neighborhoods is the River Oaks area, one of the most affluent residential areas in the United States. The white voting pattern will probably favor conservative Democrats and Republicans, similar to the pattern of white voting in District 11.

Districts 6 and 7 contain 23% and 18% blacks, respectively. These districts reflect the same demographic and probable voting patterns as Districts 11 and 15. Districts 6 and 7, however, are somewhat more homogeneous than Districts 11 and 15.

District 13, containing only 4% black, is in a horseshoe shape, encompassing the eastern, western and

northern suburbs of Harris County. In its eastern part, the district is for the most part liberal Democratic. To the north and west, the district becomes increasingly conservative.

Mr. Bracewell's expertise in Harris County politics is derived from his experience as a member of the Texas House of Representatives for two years, of the State Senate from 1950 to 1959, and as a lobbyist for various corporate interests to the Texas Legislature since the latter date. At the last session of the Legislature, his clients included the Texas Association of Taxpayers, with a membership of more than 5,000, various utility companies, and other corporate interests. In representing his clients, Mr. Bracewell opposed bills to enact a corporate income tax and to establish a utilities commission. The bill to create a utilities commission did not come to the Senate floor for a vote. The income tax measure was defeated in the Senate by a vote of 16 to 15. Generally, liberal Senators favored enactment of the corporate income tax bill, whereas conservatives were opposed to it. Mr. Bracewell, therefore, possessed a legitimate interest in electing State Senators of a conservative philosophy from Harris County.

In his deposition, Mr. Bracewell described, with admirable candor, his analysis of the requirements to be met, if conservatives were to succeed in electing conservative Democrats to the State Senate: It would be necessary, first, to devise two districts with a sufficient number of Democrats to defeat Republicans in the General Election; and, second, provide for a contingent of conservative voters in each district large enough to elect conservative candidates over liberal candidates in the Democratic Primary Elections. To accomplish this purpose, Mr. Bracewell examined and studied election

returns, and decided that the requisites of the situation demanded that liberal (black) voting precincts in the inner city be rearranged.

As noted in the majority opinion of the court, the Texas Legislature failed to enact a bill to redistrict the Texas Senate at its last session, as required by the Texas Constitution. Under the provisions of the Constitution, the responsibility for preparing a redistricting plan then devolved upon the Legislative Redistricting Board, whose ex-officio members were the Honorable Crawford Martin, Attorney General, the Honorable Ben Barnes, Lieutenant Governor, the Honorable Gus Mutscher, Speaker of the House of Representatives, the Honorable Robert Armstrong, Land Commissioner, and the Honorable Robert S. Calvert, Comptroller.

The depositions of the members of the Legislative Redistricting Board indicate very clearly that Lieutenant Governor Barnes had effective control of the redistricting process. The Lieutenant Governor delegated the task of actually drawing the maps to Robert Spellings, his executive administrative assistant. Gregg Hooser, an employee of the Joint Committee for Legislative Redistricting, assisted Spellings in drawing the maps. Hooser, prior to beginning the actual drafting, had collected and had available to him massive amounts of data regarding racial compositions of census tracts, voting results covering several years, and socio-economic profiles of census tracts.

Mr. Bracewell testified that he consulted personally with all members of the Legislative Redistricting Board concerning State Senatorial Districts in Harris County except Commissioner Armstrong, with whom he discussed the situation by telephone. He consulted

several times with the Lieutenant Governor and Mr. Spellings. He also spoke with Mr. Hooser regarding redistricting about ten times. On one of these occasions, Mr. Bracewell brought with him a colored map whose origin is obscure, but which came to be called the "Houston Chamber of Commerce map." This map, setting out proposed State Senatorial Districts in Harris County, was presented by him to Mr. Spellings. Mr. Spellings testified that the map had "a breakdown behind it that showed or that gave the Black population in each of those Senatorial Districts."

Although literally hundreds of citizens contacted the members of the Legislative Redistricting Board as to redistricting, in person, by correspondence, and by telephone and telegraph, and many of this number presented their own plans, Mr. Bracewell's views clearly appear to have carried the day, insofar as Harris County's State Senatorial Districts are concerned. Professor Murray contended that the map finally adopted by the Legislative Redistricting Board bears such a marked similarity to the Houston Chamber of Commerce map that the statistical probability of the two plans being unconnected is virtually nil. A comparison of the two maps, particularly the serpentive course of the boundaries of the Senatorial Districts in the area of the inner city, will fully bear out Professor Murray's opinion.*

Mr. Bracewell testified that, under the Plan finally adopted by the Legislative Redistricting Board, two conservative Democrats "have a chance to be elected [as well as] two liberal democrats and possibly one

*A copy of the Legislative Redistricting Board's map appears in the Appendix as Exhibit I. A copy of the configurations of the proposed Harris County Senatorial Districts set out in the Houston Chamber of Commerce map appears in the Appendix as Exhibit II.

Republican." Professor Murray identified the two most conservatively oriented districts as Districts 7 and 15. It is worthy of note that two conservative Democrats, Representatives Lemmon and Ogg, who are "members of the team that has dominated the House of Representatives in recent years," and who have enjoyed the support of Mr. Bracewell in their past races, announced for the office of State Senator in District 7 and 15, respectively. Professor Murray further testifed:

> "[I]f one had to take a hundred plans that would be construed randomly . . ., I think this would be one of the two or three that would be most favorable to the interests of Mr. Ogg and Mr. Lemmon."

It was Professor Murray's further opinion that these districts, as drawn, are "very, very favorable to the election of Mr. Lee [sic] and Mr. Ogg."

Under the 1965 redistricting plan, District 11 originally contained approximately 47 or 48% blacks. Additionally, the white majority was made up primarily of lower middle class blue collar workers. As already mentioned, voting patterns indicate that this class of whites, where economic issues are at stake, will form coalitions with blacks to elect legislators, black or white. Such a coalition was, in fact, formed when Senator Barbara Jordan was elected to the Senate from District 11 in 1966. In contrast, the new District 11, although it contains 37% blacks—just as did the old District at the time of the 1970 census—, has blacks paired with middle class and upper middle class whites. Analysis of voter registration, voter turn-out, and precinct results reveal that the whites will have political strength far out of proportion to their 65% majority. Voting habits of the whites in District 11 also demonstrate that, in a State Senatorial contest, the likelihood of

forming a coalition with blacks is unlikely. Although Senator Jordan refused to concede that she could not be elected in the new Senatorial District 11, it was the opinion of Professor Murray that the four Senatorial districts are so arranged that no possibility exists for a black to be elected. Even Senator Jordan felt, however, that it would have been more difficult for her to prevail in the new district than the old.

The net effect of the Legislative Redistricting Board's action has been, again, to fragment the inner city black voters into four districts. But while in the past these blacks' political viewpoint was represented by four liberal Democrats, one of them Black, henceforth they are likely to be represented, in two of the inner city districts, by Senators belonging to a faction of the Democratic Party which has been, in the past, inimical to the interests of blacks.

It is settled beyond any doubt that a claim of racial gerrymandering presents a justiciable issue. *Gomillion v. Lightfoot,* 364 U.S. 339, 346 (1960). Subsequently, the Supreme Court in *Wright v. Rockefeller*, 376 U.S. 52 (1964), a case involving an attack on single member districts allegedly drawn on racial lines, apparently deemed the matter to be self-evident, for it did not even discuss justificiability before proceeding to the merits. In later cases, the lower courts have uniformly interpreted *Gomillion* and *Wright* as foreclosing the matter. *E.g., Smith v. Paris*, 257 F.Supp. 901, 904 (M.D. Ala. 1966); *Sims v. Baggett*, 247 F.Supp. 96, 104 (M.D. Ala. 1965).

Proceeding now to the merits of the racial gerrymandering claim, the first question becomes that of the proper constitutional standard to be applied. In the cases involving attacks on multimember districts, the Supreme Court has articulated the test as follows: A

multimember apportionment scheme is unconstitutional if, under the circumstances of a particular case, it operates to minimize or cancel out the voting strength of racial of political elements of the voting population. *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971); *Burns v. Richardson*, 384 U.S. 73, 88 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). I am persuaded that the multimember district problem and the gerrymandering problem are sub-species and manifestations of a more basic problem. By whatever name the more basic problem is called, it amounts to this: discriminatory action whereby the party or political power group which actually accomplishes the redistricting uses its power to transform its actual voter strength into the maximum of legislative seats and to convert the other party's actual voter strength into the minimum of legislative seats. Just as majority party bias or racial effect can be exaggerated by creating multimember districts large enough to submerge racial and political minorities, so the same result can be accomplished by conscious partisan line skewing. *See* Dixon, *The Court, The People, and "One Man, One Vote"*, Reapportionment in the Seventies 29-30 (Polsby ed. 1971); Dixon, *Democratic Representation*, 462 (1968). Thus, while I am not necessarily compelled by the internal logic of the similarity noted above, the fact that the *Fortson-Burns-Whitcomb* standard is used to solve one aspect of the basic problem is persuasive that the same standard should be used to solve another aspect of the same basic problem. Moreover, language in *Gomillion v. Lightfoot, supra*, at 345, 347 and in *Wright v. Rockefeller, supra*, at 56, supports the application of the *Fortson-Burns-Whitcomb* standard to the problem of racial gerrymanders.

Applying the *Fortson-Burns-Whitcomb* criteria to the evidence adduced to support the claim of racial

gerrymandering, I am of the opinion that the evidence more than amply supports a conclusion that the Senate districts in Harris County designedly operate to dilute, minimize, and cancel out the voting strength of blacks. Certainly, when the evidence of design is coupled with the manifest consequences and clear effect of the plan promulgated for Harris County, an inference of discriminatory design is compelled. *See Smith v. Paris, supra.* It should be pointed out that Commissioner Armstrong adamantly refused to sign the plan finally adopted by the Legislative Redistricting Board, because, in his opinion, the votes of the inner city blacks in Houston were diluted. He communicated his opinion to the Attorney General and the Lieutenant Governor, hence it can hardly be contended that the Board was unaware of the plan's inherent vice.

The spirit of the statement of a three-judge court in Alabama is applicable to the situation at hand: "The . . . plan adopted by the . . . Alabama Legislature was not conceived in a vacuum. If this court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf." *Sims v. Baggett, supra,* at 109. See *Connor v. Johnson,* 402 U.S. 690 (1971); *Sims v. Amos,* —F.Supp. —, (M.D. Ala 1972). Compare: *Smith v. Allwright,* 321 U.S. 649 (1943); *Terry v. Adams,* 345 U.S. 461 (1953); *U.S. v. Texas* 384 U.S. 155 (1966).

I am of the opinion that the Court would be justified in adopting Professor Murray's plan as an interim solution to the problem before it.** Although the Court requested both plaintiffs and defendants to submit plans at the conclusion of the case, Professor Murray's plan is the only plan on file. His plan in no way can-

**Professor Murray's plan is shown in the Appendix as Exhibit III.

cels out, dilutes, or minimizes the black vote. Although his plan would make it likely that a black Senator would be elected from District 15, as shown on his plan, that result would not be an egregious inflation of the black vote, given the proportion of blacks living in Harris County.

By this, I am not to be taken to mean that I believe blacks are necessarily entitled to proportional representation. The law appears to be to the contrary. *Whitcomb v. Chavis, supra* at 156. I approach the problem from a pragmatic standpoint, trying at the same time to stay out of the political thicket. *Reynolds v. Sims*, 377 U.S. 533, 587.

SIGNED and ENTERED this 27th day of January, 1972.

WM. WAYNE JUSTICE
United States District Judge
Eastern District of Texas

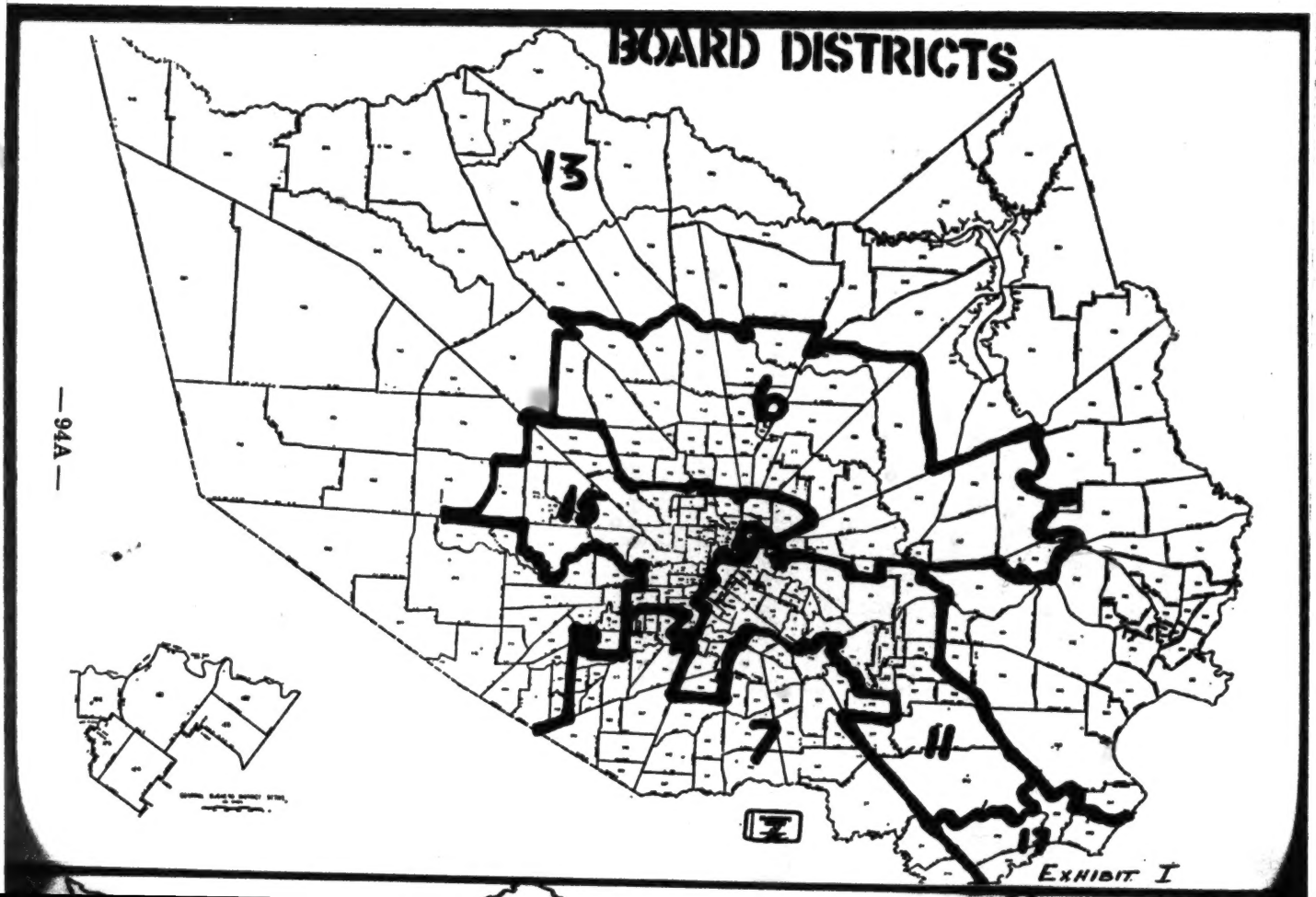
BOARD DISTRICTS
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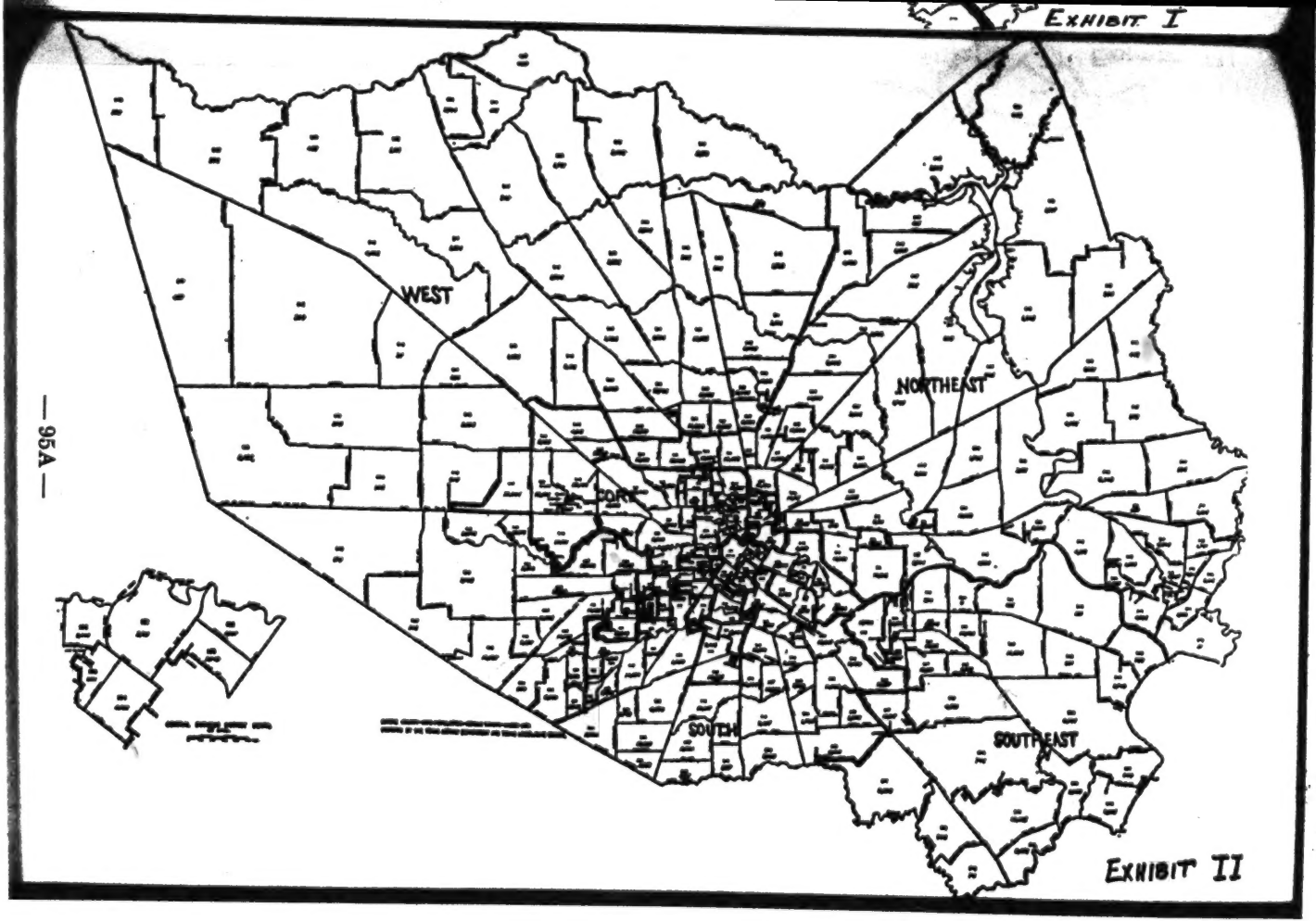
EXHIBIT I

EXHIBIT I



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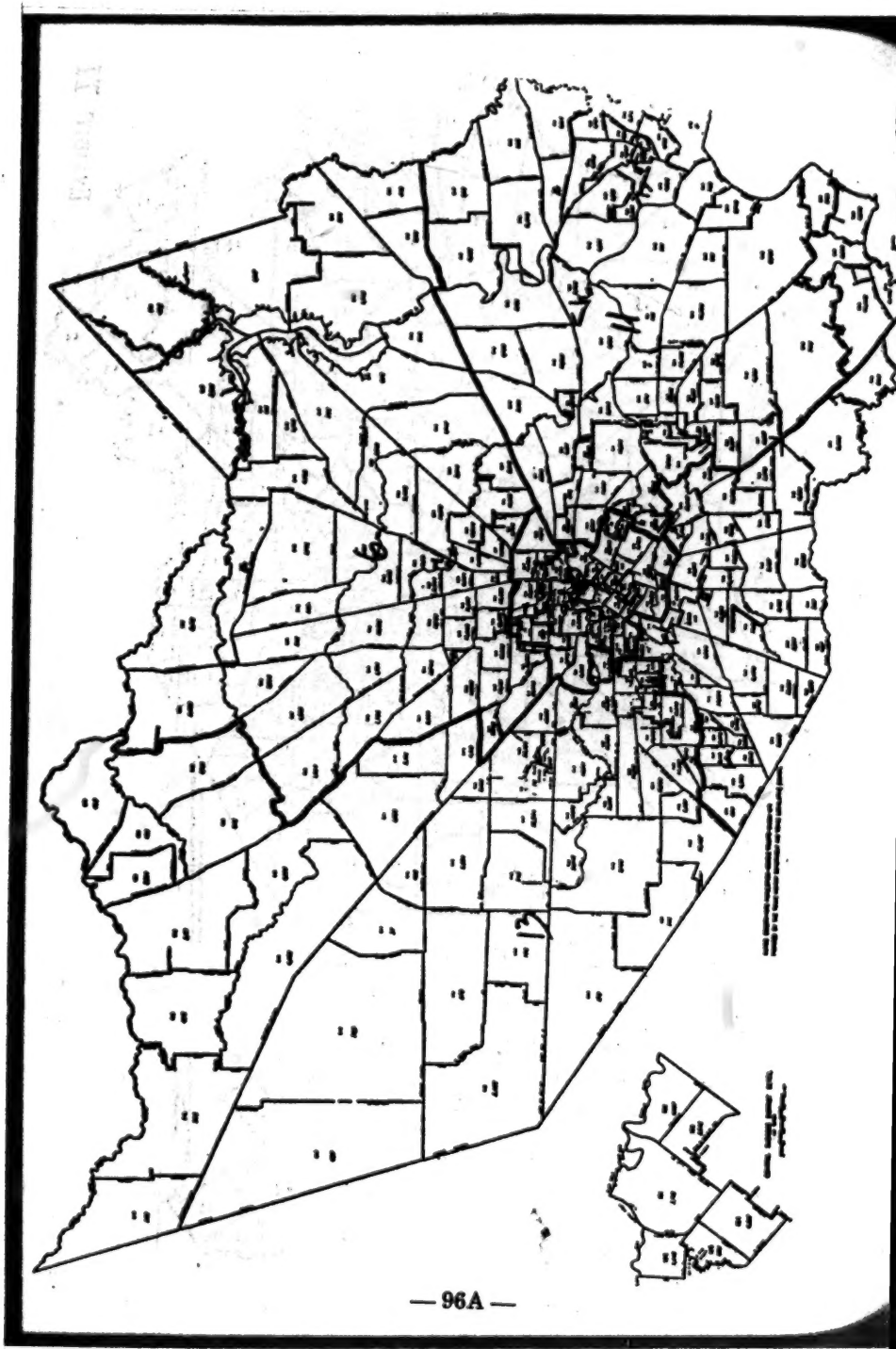

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
vs.
BEN BARNES, ET AL.

CIVIL ACTION NO. A-71-CA-143
DIANA REGESTER, ET AL.
vs.
BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144
JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.,
vs.
PRESTON SMITH, ET AL.

WOOD, District Judge, concurring in part and dissenting in part.

In concurring in part and dissenting in part with the Judgment, I make the following:

GENERAL OBSERVATIONS FOR CONSTITUTIONAL LAW APPLICABLE

Mr. M. R. Justice Harlan's separate Opinion in *Whitcomb v. Chavis* demonstrates the evident "malaise among the members of the Court" with prior decisions in the field of voter qualifications. He further observes

that the "suggestion implicit in the Court's Opinion that Appellees may ultimately prevail if they make their record in these and like respects should be recognized for what it is: a manifestation of frustration by a Court that has become trapped in the 'political thicket' and is looking for a way out." Mr. Justice Harlan continues:

> "This case is nothing short of a complete vindication of Mr. Justice Frankfurter's warning nine years ago 'of the mathematical quagmire (apart from divers judicially inappropriate and elusive determinants) into which this Court today catapults the lower courts of the country.' Baker v. Carr, 369 U.S. 186, 268 (1962) (dissenting opinion). With all respect, it also bears witness to the morass into which the Court has gotten itself by departing from sound constitutional principle in the electoral field. See the dissenting opinion of Mr. Justice Frankfurter in Baker v. Carr, supra, and my separate opinions in Reynolds v. Sims, 377 U.S. 533, 589 (1964), and in Oregon v. Mitchell, 400 U.S. 112, 152 (1970). I hope the day will come when the Court will frankly recognize the error of its ways in ever having undertaken to restructure state electoral processes.
>
> "I would reverse the judgment below and remand the case to the District Court with directions to dismiss the complaint."

While I personally agree with Mr. Justice Harlan, since the Supreme Court of the United States has entered this almost admitted impregnable political jungle, I have no alternative but to comply with this Mandate to act in these cases as best I can. While realizing my own short-comings and lack of expertise in the field of restructuring the structure of States' political processes, I must follow the law, whether I agree with it or not.

At a time in the distant past, the test of constitutionality of State action seemed to depend on whether or not it could be shown that the action was arbitrary, unreasonable or capricious. As Mr. Justice Brandeis stated in the case of *O'Gorman & Young v. Hartford Fire Insurance Co.*, 51 S.Ct. 130 (1931), the presumption of constitutionality of legislative action must prevail in the absence of some factual foundation in the record for overthrowing the action or where the record fails to show unreasonable action. (Citing cases at f/n 3. See also "The Presumption of Constitutionality," 31 Col. L. Rev. 1136, (1931).

Whitcomb v. Chavis, supra, appears to deviate and depart from this earlier concept and seems to foreordain and drape the Trial Judges with the awesome mantle of omnipotence and unerring clairvoyance in determining when State action "operates to dilute or minimize the voting strength of racial or political elements." It is apparent from the most cursory perusal of the testimony of the expert lay witnesses that reasonable men, and even the Judges disagree profoundly as to the propriety of the Texas Redistricting Board's plan for reapportionment of its House and Senate.

Under the present concept, the primary test of constitutionality in these cases is not the question of reasonableness, *vel non*, but rather turns on the question of whether the evidence merely preponderates against the fairness of the plan.

I have been ever mindful of the admonition to me on the eve of my induction as a Federal Judge by the Honorable John R. Brown, Chief Judge, U.S. Court of Appeals for the Fifth Circuit, when he reminded me that I was "appointed, not anointed." While I deplore the intrusion of the Federal Courts in the legislative affairs of the democratically elected officials of the

sovereign State of Texas, who act as a Redistricting Board under the constitution of this State, it is apparent that I must follow the Mandate of the Supreme Court and declare portions of the Redistricting and Reapportionment Plan invalid, if it appears from a preponderance of the evidence that the plan in any respect fails to meet the "one-person, one-vote" concept or it "dilutes or minimizes" and not necessarily "cancels" minority voting rights.

The uncertainty and ambiguity of testing constitutionality as set forth in *Whitcomb v. Chavis*, supra, makes not only its application most difficult, if not impossible, to this case. The only directive to the lower Court is that it is instructed to endeavor to prevail upon the Indiana Legislature to consider certain elements and factors that might improve the ethnic and minority voting representations of the losers in a pluralitarian election. All of this is apparently done under the Civil War Amendments. The Federal Courts are thus in effect using these amendments to judicially amend the Constitution without following the method prescribed by the Constitution itself. Federal Courts are enlarging rights not given under the Constitution by entering fields of purely State and local legislative management where there is little or no expertise on the part of the Federal Judiciary. Interjection by Federal Courts in this manner is a sad indictment and commentary on our heretofore sacred Democratic processes and we are in effect judicially branding our Democratic form of Government a failure in the form created under our Constitution.

For the reasons stated, I believe that this Court should exercise as much judicial restraint as possible in declaring the State Reapportionment Plan unconstitutional; however, where in those instances, as here,

the Court has deemed it necessary, the State should have every opportunity to correct its alleged mistakes where time permits.

THE CHALLENGE OF THE LEGISLATIVE REDISTRICTING BOARD'S PLAN FOR THE HOUSE OF REPRESENTATIVES

As the Opinion and Judgment of the Court in this case correctly states, various plaintiffs challenged the constitutionality of the entire Legislative Redistricting Board's plan for the House of Representatives on the grounds that unconstitutional deviations and disparities exist in the population of many House Districts and that multi-member districts in Texas are not uniform and result in invidious discrimination among certain racial and political elements.

In declaring the entire plan invalid my two learned colleagues rely on prior holdings of the Supreme Court that whenever the fact of deviation from population equality is raised, the burden falls upon the State to present "acceptable reasons for the variations among the populations of the various legislative districts." *Swann v. Adams*, 1967, 385 U.S. 440, 87 S.Ct. 569; and *Kirkpatrick v. Preisler*, 1969, 394 U.S. 524, 89 S.Ct. 1225 (a Congressional redistricting case which holds "(the Constitution) permits only limited population variances which are unavoidable despite a good faith effort to achieve absolute equality or for which justification is shown." However, the Supreme Court permits greater population deviation in the apportionment of State Legislatures, which is involved in this case. *Reynolds v. Sims*, 377 U.S. at 577-578. See also *Abbate v. Mundt*, 1971, 403 U.S. 182, 91 S.Ct.—, 29 L.Ed.2d 399, which upheld a county legislative apportionment with a total deviation of 11.9%. However, the Court

itself made very clear that *Abbate* was *sui generis*, involving only local government apportionment. And the *Kirkpatrick* holding may substantially erode the "tolerance" dictum in *Reynolds*. While it is obvious under the present constitutional standards that the evidence no longer has to establish that the State action, to be invalid, must be arbitrary, unreasonable or capricious; however, it must be more than mere suspicion, surmise or conjecture.

The percentage deviations shown in the legislative districts analyzed in the Opinion demonstrate that they are not unreasonable and are not, per se, a discrimination against "all of the people of Texas," as the Opinion maintains. Furthermore, the State of Texas (although I doubt it was required to do so under the meager evidence on this point which plaintiffs in their Briefs concede) went forward and explained and gave adequate reasons for the deviations which admittedly did not exceed in excess of 5.7% on the plus side and was not more than 4.1% on the minus side, except, of course, in Dallas County, which was a multi-member district and which deviation in Dallas County has been cured by the Court's prescribed single-member plan which this Court adopted and which replaced the multi-member district plan of Dallas, which allegedly had an approximately minus deviation of 21.6%. Certainly, I do not feel it is fair to the Redistricting Board of Texas to declare the entire plan invalid, especially since the Dallas plan now with the new single-member district meets the population requirements of "one-person, one vote."

My colleagues also criticize the entire State's plan because it is allegedly not a product of legislative action, but of the action of a "Board of five members, only one of whom is a member of the Legislature."

This overlooks the fact that this is a Board created under the provisions of Article III, Section 28, of the Constitution of Texas, for the purpose of redistricting the House and Senate of the State, where the Legislature in effect authorizes this Board to act, if the Legislature fails to do so. A most important element that this Court overlooks is that the officials who have been constitutionally designated to fill this vital role are five of the most prestigious officials elected by all of the people of the State of Texas, to-wit: the Lieutenant-Governor, the Speaker of the House of Representatives, the Land Commisisoner and the Comptroller of Public Accounts, which Board acted in this case under the advice and counsel of the also democratically elected Attorney General of Texas. The Opinion concludes that "we have serious doubts that this Board did a sort of deliberative job contemplated by *Reynolds v. Sims* as worthy of judicial abstinence." How the majority opinion reaches this conclusion from all the evidence in this case is a distinct mystery to me. In any event, the test is not the number of meetings or the type of "deliberative job" done by the Redistricting Board. Actually, the test is one of population and, even here, the mathematics do not have to be precise. See *Reynolds v. Sims*, supra, which holds: "Mathematical *exactness* or *precision* is hardly a workable constitutional requirement." (Emphasis supplied.)

The majority then finds that Texas has failed to justify the deviations which are analyzed in the opinion. All of the evidence adduced on the trial of this case conclusively establishes that a rational State policy does exist in Texas and requires adherence to County lines except in inter-urban areas under Article III, Section 21 (*sic**), Texas Constitution. In Texas, a violation of County lines is justifiable in legislative redistricting

*Should be Section 26.

only where a requirement of Federal law may be demonstrated. *Smith v. Craddick* (Tex. Sup. Ct., 1971) 471 S.W. 2d 375. *Kirkpatrick v. Preisler*, supra, supports the proposition that the State must do its best and must not settle for some fixed variation "small enough to be considered *de minimus* and to satisfy without question the 'as nearly as practicable' standard."

The Supreme Court of Texas obviously had in mind the tolerances of *Reynolds v. Sims*, undefined as they are, and while recognizing the difficulties presented, said 471 S.W. 2d at 379:

> "However, this court may not abrogate any provision of the constitution for the sake of simplicity. The federal requirement of equal representation clearly has not nullified Section 26 of Article III in its entirety."

The majority opinion then states that Texas has "also failed to provide rational justification for the haphazard combination of single and multi-member districts at issue in this case." The opinion then continues:

> "This irrationality, without reason justification, may be a separate and distinct ground for declaring the plan unconstitutional."

I respectfully submit that such a holding is contrary to *Whitcomb v. Chavis*, supra, which states the following:

> "But we have insisted that the challenger carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

Whitcomb v. Chavis, supra, concludes further that there "is no evidence that all of the multi-member districts were conceived as purposeful devices to further racial or economic discrimination."

Whitcomb v. Chavis, supra, further finds that "affirmance of the District Court would spawn endless litigation."

I can think of nothing which illustrates better the agonizing chaos which exists in the area of restructuring the political districts of the soveriegn States than this decision, wherein it is painfully obvious that the three Judges composing this very Court have almost no unanimity in finding a path from the impenetrable thicket in which the Federal Courts now find themselves.

The plaintiffs who challenge the multi-member districts throughout the State of Texas, other than in Dallas and Bexar Counties, readily concede that because of the pressures and lack of time they were unable to develop a full record of unconstitutionality as to the other counties and the impact of the at-large systems throughout the State. Furthermore, since the evidence is admittedly deficient as to the alleged inequities in the other Counties, and there have been no complaints by any citizens from those other large metropolitan "at-large districts," I feel that this is an additional reason for upholding the validity of the State's plan after the inequqities have been corrected by new plans which this Court has prescribed for Dallas and Bexar Counties.

While I wholeheartedly disagree with my colleagues, who have declared this State's plan unconstitutional, I do concur in their generosity in affording the State of Texas until on or before July 1, 1973 to adopt a plan to reapportion the legislative districts for the House of Representatives in accordance with the guidelines as set out in the Opinion and Judgment of this Court.

SUITS INVOLVING THE SENATORIAL DISTRICTS IN HARRIS AND BEXAR COUNTY

I join with Judge Goldberg in upholding the validity of the Reapportionment Plan of the State of Texas for its Senatorial Districts. The Senatorial Districts throughout the State are single-member districts and the population requirements of "one person, one vote" have apparently been achieved.

Inasmuch as no plan for Senatorial Redistricting in Bexar County or Harris County into different shaped single-member districts meets the wishes, requirements and needs of everyone and there is a vast difference of opinion almost equally divided as to what the best means of dividing the districts would be, and inasmuch as it appears that the plaintiffs have failed to sustain their burden of proving by a preponderance of the evidence that the Senatorial Districts operate to dilute or cancel the voting strength of racial or political elements, I agree that the action of the Redistricting Board is valid and constitutional.

The Supreme Court, in *Kilgarlin v. Hill*, 386 U.S. 120 (1967), approved the lower court's statement that the court's inquiry "must end when it is satisfied that the judicially-ascertainable standard of substantial equality of population in the Districts has been achieved." *Kilgarlin v. Martin*, 252 F. Supp. at 434.

In the Houston case, Senator Barbara Jordan, a Black, testified that she would not concede that she could not win from the new Senatorial District 11 because she believed that she could appeal to a broad base of the voters. Even Doctor Murray, the expert witness for the plaintiffs in the Houston case, concedes that a certain amount of gerrymandering is absolutely essential in any event in Harris County to meet the require-

ments of population and other considerations of population and other considerations such as ethnicticity, contiguity, and community of interests.

In the San Antonio (Bexar County) case, the two Senatorial posts are filled by an Anglo and a Mexican-American. The Mexican-Americans are not a minority in Bexar County; they comprise a group nearly equal in size to the Anglo group. Senatorial District 21 combines approximately 110,000 people of Bexar County with approximately 250,000 people from rural counties East, West and South of Bexar County, and although there is no real community of interest between the two groups, a division of some sort is necessary to maintain the "one person—one vote" requirement, and it appears that even if the 110,000 persons from Bexar County were to be taken from any other portion of Bexar County than from the North side, there would be no substantially greater community of interest established.

THE CHALLENGE AGAINST THE MULTI-MEMBER LEGISLATIVE DISTRICTS IN BEXAR AND DALLAS COUNTIES

While I deplore, as heretofore stated, the intrusion of the Federal Courts in the legislative affairs of the democratically elected officials of the soverign State of Texas, *Whitcomb v. Chavis*, and its progeny, dictate that Federal Courts must do so where the preponderance of the evidence discloses that the State action "operates to dilute or cancel the voting strength of racial or political elements." In this connection, I personally feel that the evidence does in fact preponderate in this direction and that, based on this test, I concur with my colleagues that the Board's Reapportionment Plans for multi-member districts in Bexar and Dallas

Counties are unconstitutional for the various reasons stated in the majority opinion.

SIGNED AND ENTERED this 27th day of January, 1972.

JOHN H. WOOD, JR.
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142

CURTIS GRAVES, ET AL.

vs.

BEN BARNES, ET AL.

CIVIL ACTION NO. A-71-CA-143

DIANA REGESTER, ET AL.

vs.

BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144

JOHNNY MARIOTT, ET AL.

vs.

PRESTON SMITH, ET. AL.

CIVIL ACTION NO. A-71-CA-145

VAN HENRY ARCHER, JR.,

vs.

PRESTON SMITH, ET AL.

GOLDBERG, CIRCUIT JUDGE,
CONCURRING SPECIALLY:

I concur in the result of Section Four (4) of the Opinion.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
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JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.
vs.
PRESTON SMITH, ET AL.

ORDER

[Filed Feb. 8, 1972]

Plaintiffs having moved the Court to amend its Opinion and Order of the 28th day of January 1972, pursuant to Rule 60(a) of the Rules of Federal Procedure, and the Court being of the opinion that the amendment solely rectifies clerical errors and that the motion should be granted;

It is ORDERED that Legislative District 33A described in the Opinion and Order of this Court of January 28, 1972, shall be amended so as to read as follows:

DISTRICT 33A

PART OF DALLAS COUNTY:

Census Tract	Population
143 (Less Block 7, 8 & 9)	16,872
144 (all except E.D. 69, 70, 82 and 82B	8,090
145	7,142
146	6,353
147	7,157
148	3,366
149	2,564
150	5,424
151	7,681
152	8,995
TOTAL	73,644

It is ORDERED that Legislative District 33B described in the Opinion shall be made to read as follows:

DISTRICT 33B

PART OF DALLAS COUNTY:

Census Tract	Population
72 (Blocks 2 & 3 only)	2,702
97 (Blocks 3, 4 & 5 only)	4,470
99	3,236
136.01	1,649
137.01	4,561
137.02	7,303
137.03	6,797
137.04	52
137.05	39
138.01	284
138.02	9,623
139	8,439
140.01	4,283
140.02	314
141.01	1,735
141.02	391
141.03	44
141.04	7,890
142	3,873
143 (Blocks 7, 8 & 9 only)	6,078
TOTAL	73,763

It is ORDERED that Legislative District 33C described in the Opinion shall be made to read as follows:

DISTRICT 33C

PART OF DALLAS COUNTY:

Census Tract	Population
4.01	2,893
4.02	5,647
4.03	6,509
5	4,582
16	6,007
17.01	816
17.02	3,103
18	2,657
19	1,447
21	200
22.01	1,669
22.02	2,265
23	2,553
25 (Blocks 3 & 4 only)	2,304
28	2,523
29	3,778
30	649
31.01	2,465
31.02	56
32.01	377
35	3,277
36 (Block 1 only)	710
71.02	7,662
100	3,665
102	6,511
TOTAL	73,825

Copies of this Order will be forwarded to all attorneys of record, the Governor of the State of Texas, the Lieutenant Governor of the State of Texas, the Speaker of the House of Representatives of the State of Texas, the Secretary of State of the State of Texas, and the Attorney General of the State of Texas.

Dated at Dallas, Texas, this 8th day of February, 1972.

s/
IRVING L. GOLDBERG, Circuit Judge

s/
WILLIAM WAYNE JUSTICE,
District Judge

s/
JOHN H. WOOD, JR., District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-143
DIANA REGESTER, ET AL.
vs.
BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144
JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR.
vs.
PRESTON SMITH, ET AL.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Filed, March 27, 1972]

Preston Smith, Governor of Texas, Bob Bullock, Secretary of State of Texas, Roy Orr, Chairman, Texas State Democratic Executive Committee, and the Texas Legislative Redistricting Board, composed of the following officials of the State of Texas: Ben Barnes, Lieutenant Governor, G. F. Mutscher, Speaker of the House, Bob Armstrong, Commissioner of the General Land Office, Robert S. Calvert, Comptroller of Public Accounts, and Crawford C. Martin, Attorney General;

Hereby give notice of appeal to the Supreme Court of the United States from the final judgment of in-

junction entered jointly in each of the above named and numbered causes on January 28, 1972.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

LEON JAWORSKI
ALTON F. CURRY
Special Assistant
Attorneys General

SAMUEL D. MCDANIEL
Staff Legal Assistant

Attorneys for the Defendant
State Officials

EARL LUNA
Attorney for Roy Orr

PROOF OF SERVICE

I, Samuel D. McDaniel, one of the attorneys for the appellants in the above causes, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of March, 1972, I served copies of the above Notice of Appeal on each person listed below by depositing same in the United States mail, first class postage prepaid, addressed as stated, and that such addressees constitute the attorneys of record for appellees in these causes:

Oscar H. Mauzy
1601 National Bankers Life Building
Dallas, Texas 75201

David R. Richards
600 West 7st Street
Austin, Texas 78701

Id Idar, Jr.
319 Aztec Building
211 East Commerce
San Antonio, Texas 78205

Frank Hernandez
300 Southwest Building
Dallas, Texas 75202

Walter L. Irvin
301 North Market Street
Dallas, Texas 75202

Cleo Steele
2818 Pennsylvania
Dallas, Texas 75215

John L. Roach
Republic Bank Tower
Dallas, Texas 75201

Thomas G. Crouch
Republic Bank Tower
Dallas, Texas 75201

Robert M. Greenberg
1105 Mercantile Securities Building
Dallas, Texas 75201

Nathan W. Eason
400 Alamo National Building
San Antonio, Texas 78205

E. Brice Cunningham
2606 Forest Avenue, Suite 202
Dallas, Texas 75215

L. A. Bedford, Jr.
2606 Forest Avenue, Suite 208
Dallas, Texas 75215

C. B. Bunkley, Jr.
3318 Oakland Avenue
Dallas, Texas 75215

Fred J. Finch, Jr.
4510 South Oakland Avenue
Dallas, Texas 75212

Thomas Gee
Austin National Bank Building
Austin, Texas 78701

James A. Mattox
805 National Bankers Life Building
202 S. Ervay
Dallas, Texas 75201

Ronald L. Clower
1212 San Jacinto
Dallas, Texas 75202

SAMUEL D. MCDANIEL

EXHIBIT C

APPORTIONMENT OF THE STATE OF TEXAS INTO REPRESENTATIVE DISTRICTS

WHEREAS, The Regular Session of the 62nd Legislature of the State of Texas was adjourned sine die on May 31, 1971; and

WHEREAS, During that Regular Session, which constituted the first Regular Session after the publication of the 1970 United States decennial census, the Legislature failed to apportion the state into representative districts; and

WHEREAS, In such an event Article III, Section 28, of the Texas Constitution, requires that

> . . . same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding state-wide general election.

and

WHEREAS, The Legislative Redistricting Board of

Texas assembled in the City of Austin on August 24, 1971; now, therefore,

BE IT ENACTED BY THE LEGISLATIVE REDISTRICTING BOARD OF TEXAS:

Section 1. The Representative Districts of the State of Texas shall be composed respectively of the following counties or defined areas, and each district shall be entitled to elect one representative except as otherwise provided herein:

1. Bowie County and that part of Red River County included in census enumeration districts 1, 2, 3, 4, 5, 6 7, 8, 8B, 9, 9B, 10, 11, 14 and 23.

2. Cass, Marion, Morris and Upshur counties and that part of Smith County included in census tracts 15 and 17 and census enumeration districts 124, 125, 126, 127, 128, 129, 130, 132, 133 and 134.

3. Harrison and Rusk counties.

4. Nacogdoches, Panola and Shelby counties.

5. Hardin and Jasper counties and that part of Jefferson County included in census tracts 113, 114 and 115 and that part of census tract 3 included in census enumeration district 203 and census block groups 4, 5, 6, 7, 8 and 9 and census tract 116 except census enumeration district 229.

6. Angelina, Newton, Sabine and San Augustine counties.

7. That part of Jefferson County not included in districts 5 and 8.

Place 1

Place 2

Place 3

8. Orange County and that part of Jefferson County included in census enumeration districts 213 and 218 and that part of census tract 112 included in census block groups 2, 4 and 9 and that part of census enumeration district 215 contiguous to Orange County and census tract 112.

9. Camp, Delta, Franklin, Lamar and Titus counties and that part of Red River County included in census enumeration districts 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 24 and 25.

10. Hopkins, Hunt and Rains counties.

11. Kaufman, Van Zandt and Wood counties.

12. That part of Smith County included in census tracts, 1, 2.01, 2.02, 3, 4, 5, 6, 7, 8, 9, 10, 11.01, 11.02, 12, 13, 14, 16 and census enumeration districts 63, 64, 97, 98, 99, 131, 135, 136, 137, 138, 147, 148, 149, 150, 151, 152, 153 and 154.

13. Gregg County.

14. Anderson, Freestone and Henderson counties and that part of Smith County included in census tract 21 and census enumeration districts 139, 155, 156, 157, 158, 159, 160, 161, 162, 163, 163B and 164.

15. Cherokee, Houston, Leon and Limestone counties.

16. Liberty, Polk, San Jacinto, Trinity and Tyler counties.

17. Chambers County, that part of Galveston County included in census tracts 1210, 1211, 1216, 1217, 1219, 1254 and 1255, and that part of Harris County included in census tracts 359, 360, 362, 363, 365, 366, 367, 368, 369 and 370.

18. Montgomery and Walker counties.

19. That part of Galveston County not included in district 17.

Place 1
Place 2

20. That part of Brazoria County not included in districts 21 and 31.

21. Fort Bend County and that part of Brazoria County included in census enumeration districts 1, 1B, 1C, 2, 2B, 3, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 48, 50, 54, 78, 79, 86, 87, 88, 89, 90, 98, 99 and 102.

22. That part of Grayson County not included in district 23.

23. Cooke, Fannin and Wise counties and that part of Grayson County included in census tracts 18 and 19.

24. Collin and Rockwall counties.

25. Denton County.

26. Dallas County.

Place 1
Place 2
Place 3
Place 4
Place 5
Place 6
Place 7
Place 8
Place 9
Place 10
Place 11
Place 12
Place 13
Place 14
Place 15

Place 16
Place 17
Place 18

27. Ellis and Navarro counties.

28. Brazos and Robertson counties.

29. Austin, Burleson, Grimes, Madison, Waller and Washington counties.

30. Bastrop, Colorado, Fayette, Gonzales and Lee counties.

31. Matagorda and Wharton counties and that part of Brazoria County included in census enumeration districts, 91, 92, 93, 94, 97, 100, 101, 103, 104A, 106, 107, 108, 160 and 160B.

32. That part of Tarrant County not included in district 42.

Place 1
Place 2
Place 3
Place 4
Place 5
Place 6
Place 7
Place 8
Place 9

33. Erath, Hood, Johnson and Somervell counties.

34. Bosque, Coryell, Hamilton and Hill counties.

35. McLennan County.

Place 1
Place 2

36. Falls, Milam and Williamson counties.

37. Travis County.
Place 1
Place 2
Place 3
Place 4

38. Caldwell, Comal and Guadalupe counties.

39. DeWitt, Goliad, Jackson, Karnes, Lavaca and Refugio counties.

40. Calhoun and Victoria counties.

41. Aransas and San Patricio counties and that part of Nueces County included in census tracts 36, 37, 58, 59 and 61.

42. Parker County and that part of Tarrant County included in census tracts 108.01, 108.02, 108.03, 110.01, 110.02, 112.01, 113, 114, 115.03, 115.04, 139, 141 and 142.

43. Burnet, Lampasas and Mills counties and that part of Bell County included in census enumeration districts 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 67B, 68, 69, 70, 71, 72, 73, 74, 75, 75B, 75C, 78, 78B, 90, 93, 95, 97, 98, 99, 100, 101, 102, 103, 104 and 105.

44. That part of Bell County not included in district 43.

45. Bandera, Blanco, Frio, Hays, Kendall and Medina counties and that part of Bexar County included in census tracts 1720, 1820, 1821 and 1916.

46. That part of Bexar County not included in district 45.
Place 1
Place 2
Place 3
Place 4

Place 5
Place 6
Place 7
Place 8
Place 9
Place 10
Place 11

47. Atascosa, Bee, Dimmit, LaSalle, Live Oak, McMullen and Wilson counties.

48. That part of Nueces County not included in district 41.

Place 1
Place 2
Place 3

49. Kenedy, Kleberg and Willacy counties and that part of Hidalgo County included in census tracts 225, 226, 231, 232, 233, 234 and 243.

50. That part of Cameron County not included in district 51.

51. That part of Cameron County included in census tracts 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 117, 118, 119, 120 and 121 and that part of Hidalgo County included in census tracts 227, 229 and 230.

52. That part of Wichita County not included in district 53.

53. Archer, Clay and Young counties and that part of Wichita County included in census tracts 120, 121, 122, 123, 124, 125, 126, 128, 129, 130, 131, 136, 137 and 138.

54. Eastland, Jack, Montague, Palo Pinto and Stephens counties.

55. Brown, Callahan, Coleman, Comanche, McCulloch and Runnels counties.

56. Gillespie, Kerr, Kimble, Llano, Mason, Menard, Real, San Saba, Schleicher and Uvalde counties.

57. Webb and Zapata counties.

58. Brooks, Duval, Jim Hogg, Jim Wells and Starr counties.

59. That part of Hidalgo County not included in districts 49 and 51.

Place 1

Place 2

60. Concho, Irion and Tom Green counties.

61. Fisher, Jones, Mitchell and Nolan counties and that part of Taylor County included in census tracts 120, 121, 127, 128, 129, 130, 131, 132, 133, 134, 135 and 136 and that part of census tract 126 included in census enumeration district 79.

62. That part of Taylor County not included in district 61.

63. Borden, Coke, Dawson, Howard, Scurry and Sterling counties.

64. Dallam, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Roberts and Sherman counties.

65. Carson and Randall counties and that part of Potter County included in census tracts, 101, 117, 121, 129, 130, 133, 134, 135, 138, 141, 142 and 143.

66. Armstrong, Briscoe, Childress, Collingsworth, Donley, Floyd, Gray, Hall, Motley and Wheeler counties.

67. That part of Potter County not included in district 65.

68. Glasscock, Midland, Reagan and Upton counties.

69. Crane, Loving, Pecos, Reeves, Ward and Winkler counties and that part of Ector County included in census tracts, 1, 20, 21, 22, 25 and 26.

70. Brewster, Crockett, Edwards, Kinney, Maverick, Sutton, Terrell, Val Verde and Zavala counties.

71. Culberson, Hudspeth, Jeff Davis and Presidio counties and that part of El Paso County included in census tracts, 34.02, 41.02, 42.01, 42.02, 43.01, 43.02, 43.03 and 103.

72. That part of El Paso County not included in district 71.

Place 1
Place 2
Place 3
Place 4

73. That part of Ector County not included in district 69.

74. Bailey, Castro, Cochran, Deaf Smith, Lamb, Oldham and Parmer counties.

75. That part of Lubbock County not included in District 76.

Place 1
Place 2

76. Hale and Swisher counties and that part of Lubbock County included in census tracts 22, 25, 101, 102, 105, 106 and 107.

77. Andrews, Gaines, Hockley, Lynn, Martin, Terry and Yoakum counties.

78. That part of Harris County included in census tracts, 234, 249, 250, 251, 252, 253, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275 and 364.

79. That part of Harris County included in census tracts, 125, 126, 401, 402, 403, 404, 505, 506, 512, 513 and 514.

80. That part of Harris County included in census tracts 316, 331, 332, 333, 335, 338, 339, 412, 414 and 415.

81. That part of Harris County included in census tracts, 327, 328, 334, 336, 337, 340, 341, 342, 343, 428, 429, 430, 431 and 432.

82. That part of Harris County included in census tracts 507, 510, 511, 517, 518, 519 and 520.

83. That part of Harris County included in census tracts 406, 420, 421, 442, 443, 515 and 516.

84. That part of Harris County included in census tracts 523, 524, 525, 526, 527, 530, 531 and 540.

85. That part of Harris County included in census tracts 314, 315, 317, 318, 319, 329 and 330.

86. That part of Harris County included in census tracts, 124, 302, 304, 305, 306, 307, 308 and 309.

87. That part of Harris County included in census tracts, 121, 122, 123, 201, 202, 301, 303, 310, 311, 312, 501, 502 and 504.

88. That part of Harris County included in census tracts 204, 205, 206, 207, 208, 216 and 503.

89. That part of Harris County included in census tracts 214, 215, 217, 218, 219, 225, 226 and 227.

90. That part of Harris County included in census tracts 405, 407, 408, 409, 410, 411, 413, 416 and 417.

91. That part of Harris County included in census tracts 418, 419, 423, 424, 425 and 426.

92. That part of Harris County included in census tracts 422, 439, 440, 441, 444 and 445.

93. That part of Harris County included in census tracts 427, 433, 434, 435, 436, 437, 438, 446, 447 and 449.

94. That part of Harris County included in census tracts 222, 223, 240, 241, 242, 448, 450, 451, 452, 528, 529, 534, 535, 536, 537, 538, 539, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557 and 558.

95. That part of Harris County included in census tracts 220, 221, 508, 509, 521, 522, 532 and 533.

96. That part of Harris County included in census tracts, 224, 228, 229, 230, 231, 235, 236, 237, 238, 239, 243, 244, 245, 246, 247, 248, 254 and 559.

97. That part of Harris County included in census tracts 313, 320, 321, 323, 324, 325 and 326.

98. That part of Harris County included in census tracts 203, 209, 210, 211, 212, 213, 322 and 350.

99. That part of Harris County included in census tracts 232, 233, 351, 352, 353, 354, 355, 356, 357, 358 and 361.

100. That part of Harris County included in census tracts, 344, 345, 346, 347, 348, 349, 371, 372, 373, 374 and 375.

101. Baylor, Cottle, Crosby, Dickens, Foard, Garza, Hardeman, Haskell, Kent, King, Knox, Shackelford, Stonewall, Throckmorton and Wilbarger counties.

Sec. 2. The terms "census tract" and "census enumeration district," as used in this act, mean those geo-

graphic areas outlined and identified as such on official place, county, and metropolitan map series maps prepared by the United States Department of Commerce Bureau of the Census for the Nineteenth Decennial Census of the United States, enumerated as of April 1, 1970. "Block groups" are subdivisions of census tracts as defined on census metropolitan maps which differentiate block groups by the first digit of the block numbers assigned to city blocks within each tract.

Sec. 3. (a) As soon as possible after this act is filed with the secretary of state, the secretary of state shall transmit a copy of the act to the county clerk of each county in the state, to be filed as an official public record in the office of the county clerk. At the same time, the secretary of state shall also furnish to the county judge of each county which is divided into two or more representative districts or parts of two or more representative districts appropriate maps showing census tracts, census enumeration district, or census block group lines to facilitate the identification of representative district boundaries.

The county judge shall present the maps to the commissioners court, to be used in making whatever changes are necessary in election precinct boundaries in order to comply with the prohibition in Subsection (b), Section 12, Texas Election Code (Article 2.04, Vernon's Texas Election Code), which reads in relevant part as follows:

> "(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor out of the parts of two or more justice precincts or commissioners precincts; and no election precinct shall be formed out of two or more congressional districts or state senatorial districts or state representative districts, nor out of the parts of two or more such districts. . . . Subject

to the provisions of the first sentence of this paragraph, no election precinct shall have resident therein less than fifty nor more than two thousand voters as ascertained by the number of registered voters for the last preceding presidential general election year; provided, however, that in precincts in which voting machines have been adopted for use in accordance with Section 79 of this code, the maximum number of voters shall be three thousand."

(b) Although the time specified in Subsection (b) of Article 2.04 of the Texas Election Code, for making changes in election precinct boundaries has passed, in order to make the apportionment districts adopted by the Legislative Redistricting Board effective for the next election year in compliance with the mandate of Section 28 of Article III of the Constitution of the State of Texas, the commissioners courts, within 30 days after the date the maps are mailed by the secretary of state as required by Subsection (a) of this section, shall make such changes in the boundaries of the election precincts of their respective counties as may be necessary to comply with the above quoted provision of Subsection (b) of Article 2.04 of the Texas Election Code.

Such changes in the election precinct boundaries shall become operative in the holding of elections on and after March 1, 1972, and registration of voters for voting at elections held during the 1972 voting year shall conform to the changes. Where changes in election precincts are necessary, the county tax assessor-collector as registrar of voters shall defer the issuance of registration certificates for voters residing in the affected areas until the changes have been made. The registrar is further directed to make all necessary corrections in the registration records for the voting period

which begins on March 1, 1972, as provided in Section 48b, Texas Election Code, as added by Section 9, Chapter 827, Acts of the 62nd Legislature, Regular Session, 1971 (Article 5.16b, Vernon's Texas Election Code). Any and all acts required of any other state or county officer as a result of changes made in the election precincts as necessitated by this act may be delayed accordingly, but only for the period of time necessary to accomplish the acts required.

Sec. 4. The apportionment plan adopted by the Legislative Redistricting Board is effective for the elections, primary and general, for all members of the house of representatives to the 63rd Legislature, and continues in effect for succeeding legislatures. This apportionment plan does not affect the membership of the 62nd Legislature. If a vacancy occurs in the office of any member of the house of representatives of the 62nd Legislature and a special election to fill the vacancy becomes necessary, the election shall be held in the district as it existed before the effective date of this act.

WE, THE UNDERSIGNED, hereby acknowledge the foregoing instrument to be the act and deed of the Legislative Redistricting Board of Texas, executed on this 22nd day of October A.D. 1971.

s/
CRAWFORD C. MARTIN, Chairman
Attorney General of Texas

s/
BEN BARNES
Lieutenant Governor of Texas

s/
G. F. (GUS) MUTSCHER
Speaker, House of Representatives
of Texas

s/
BOB ARMSTRONG
Commissioner of the General
Land Office of Texas

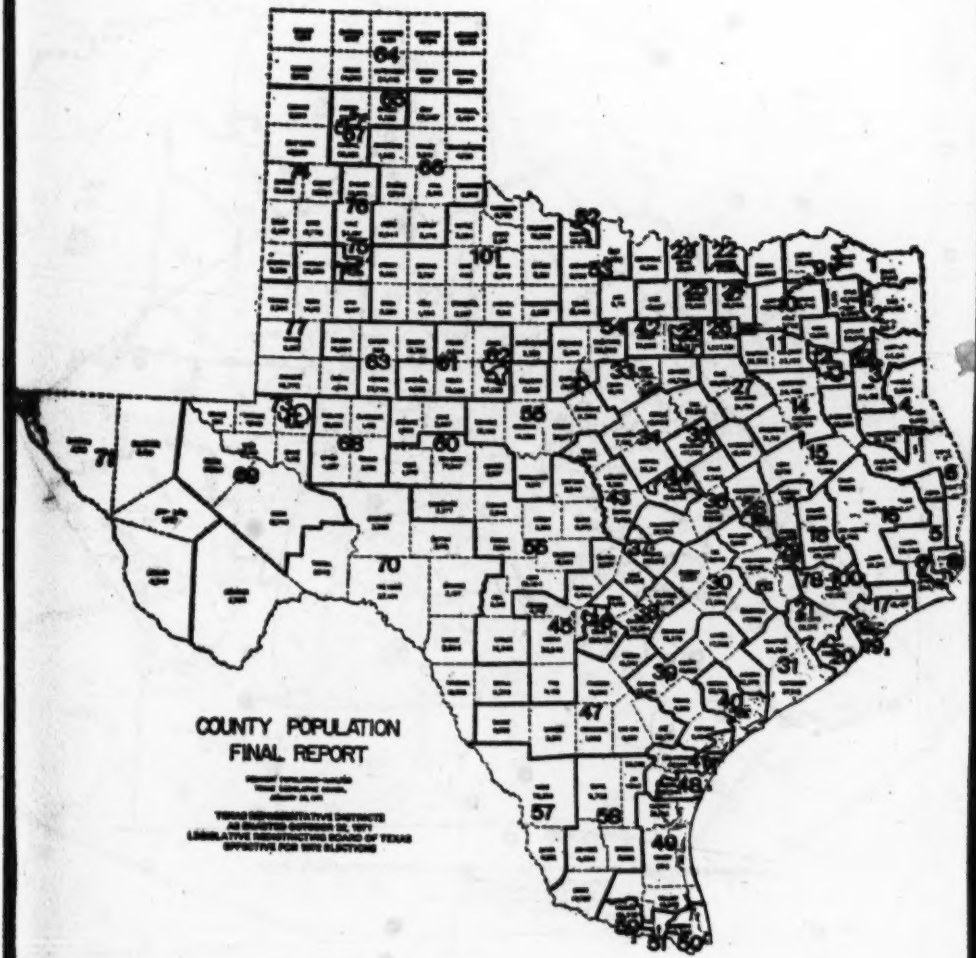
s/
ROBERT S. CALVERT
Comptroller of Public Accounts
of Texas

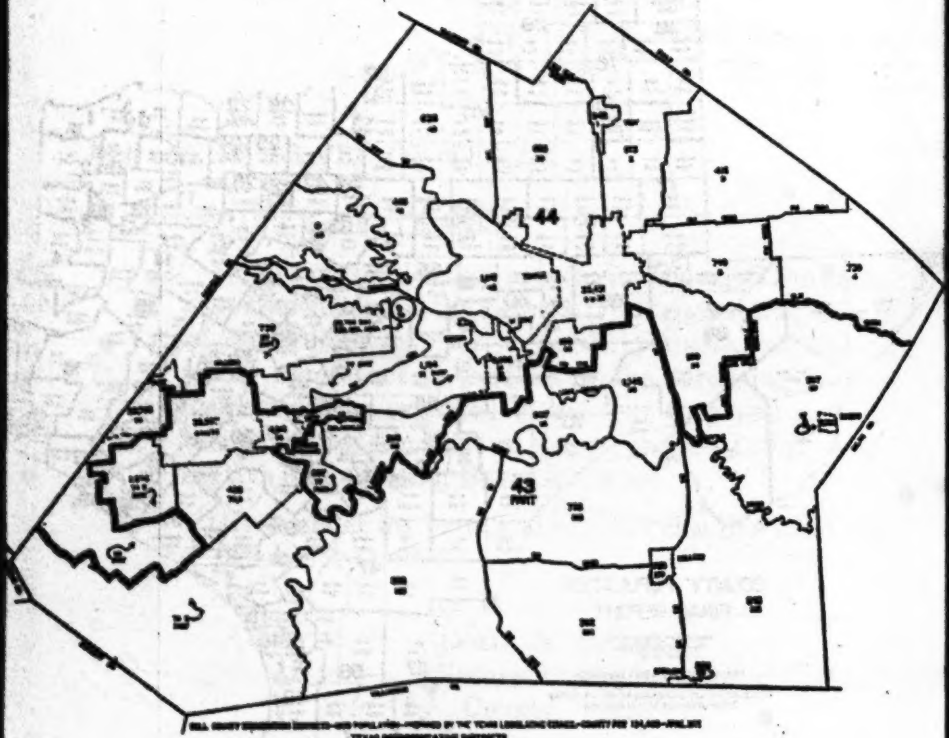
THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

Before me on this day personally appeared the above signed members of the Legislative Redistricting Board of Texas known to me to be the persons and officers whose names are subscribed to the foregoing instrument and acknowledged to me that they and each of them executed the same as the act and deed of the Legislative Redistricting Board of Texas.

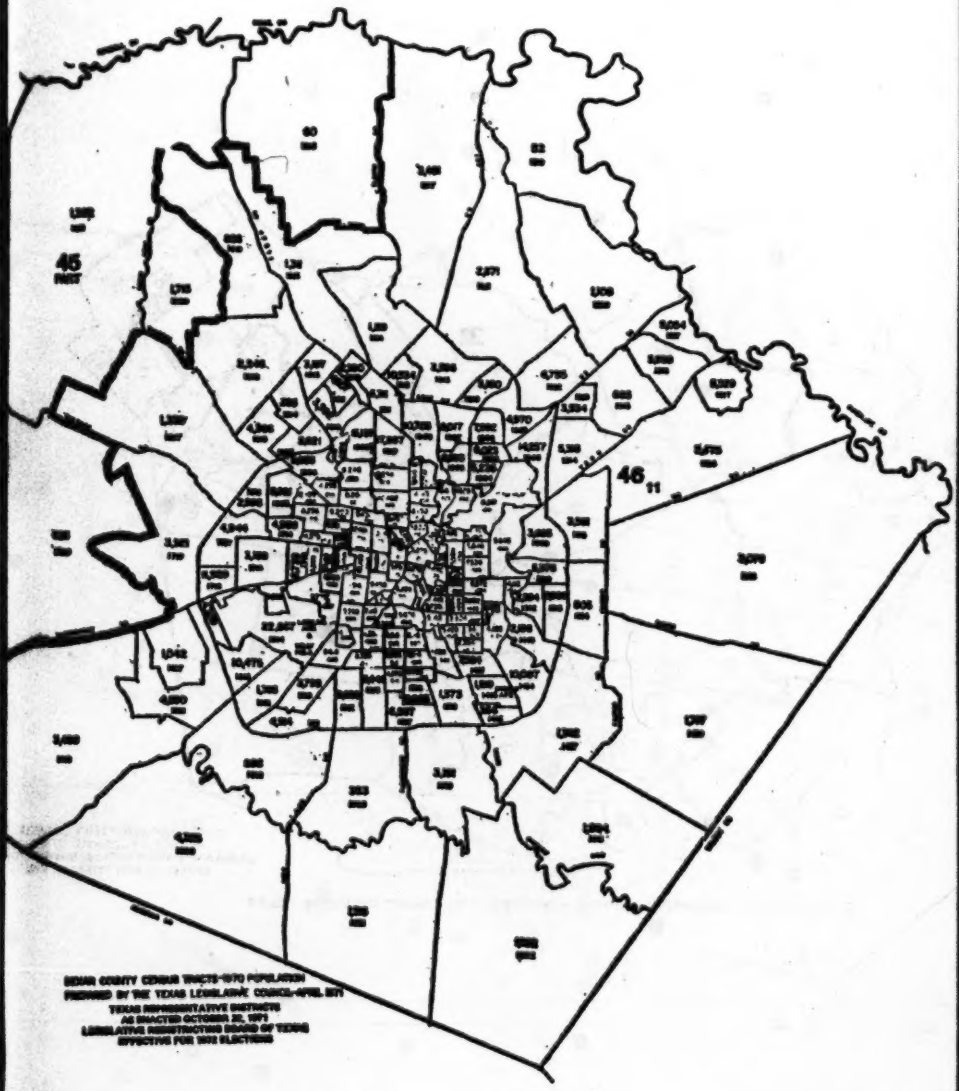
Given under my hand and seal of office this 22nd day of October A.D. 1971.

s/
JAMES R. REYNOLDS
Notary Public in and for Travis
County, Texas

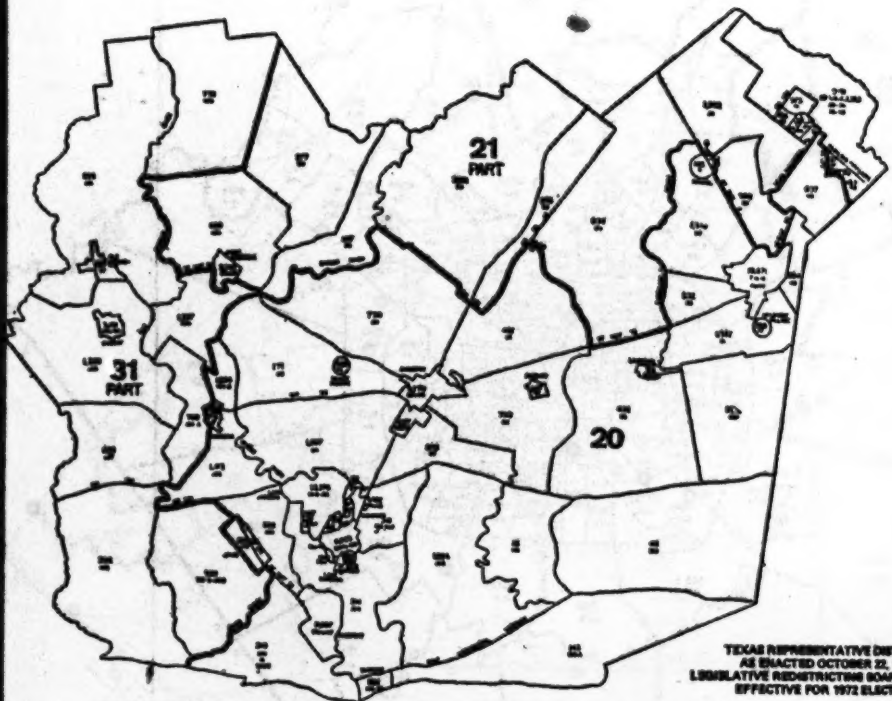

COUNTY POPULATION
FINAL REPORT



TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

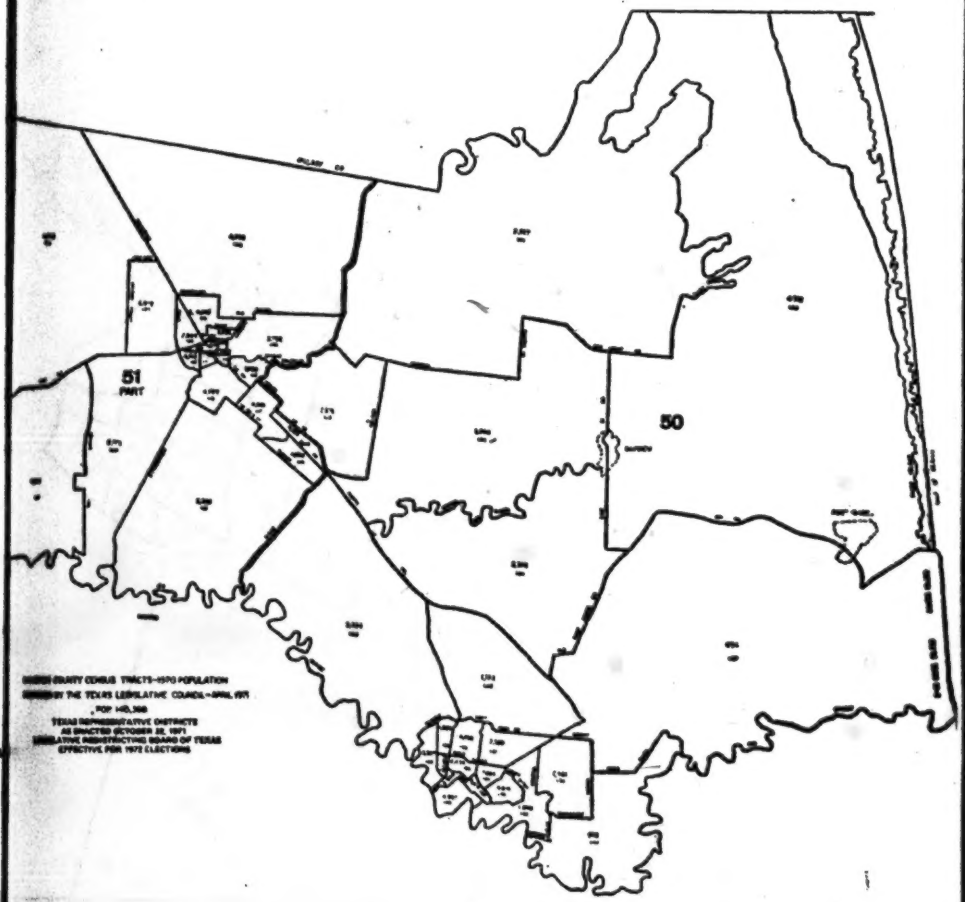


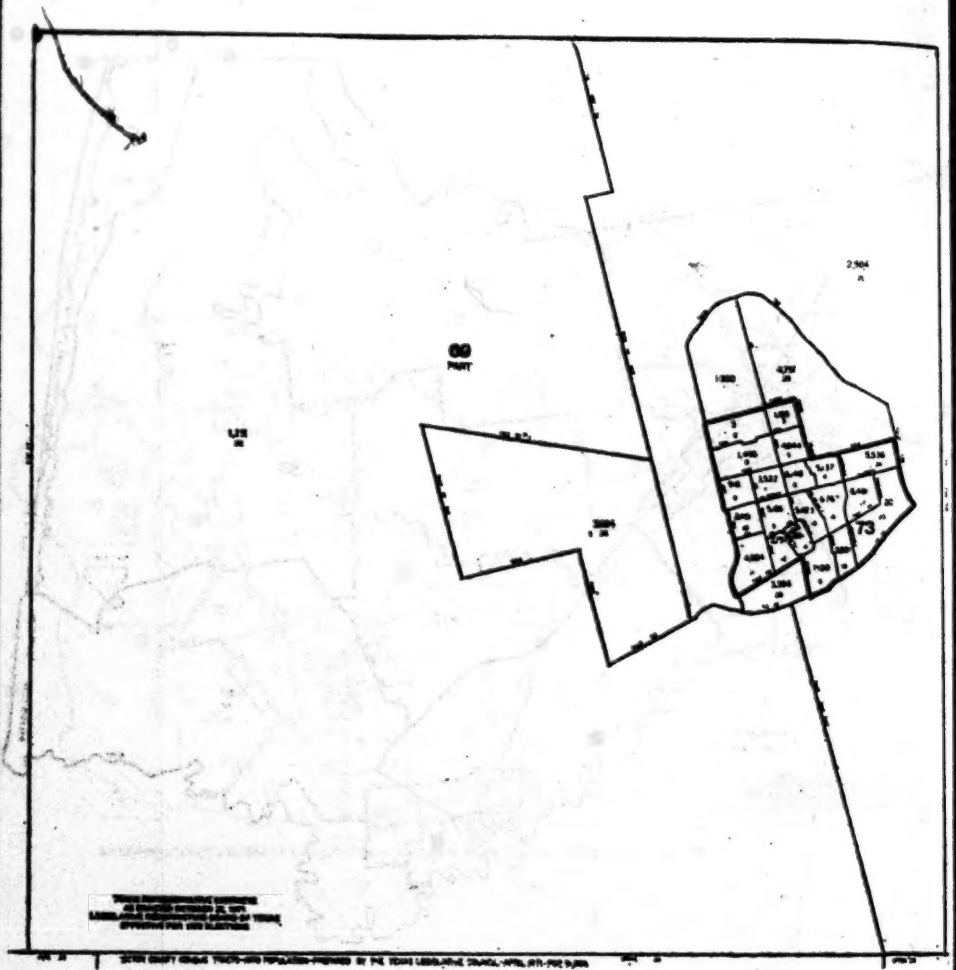
BEXAR COUNTY CENSUS TRACTS-1970 POPULATION
PREPARED BY THE TEXAS LEGISLATIVE COUNCIL-APRIL 1971
TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

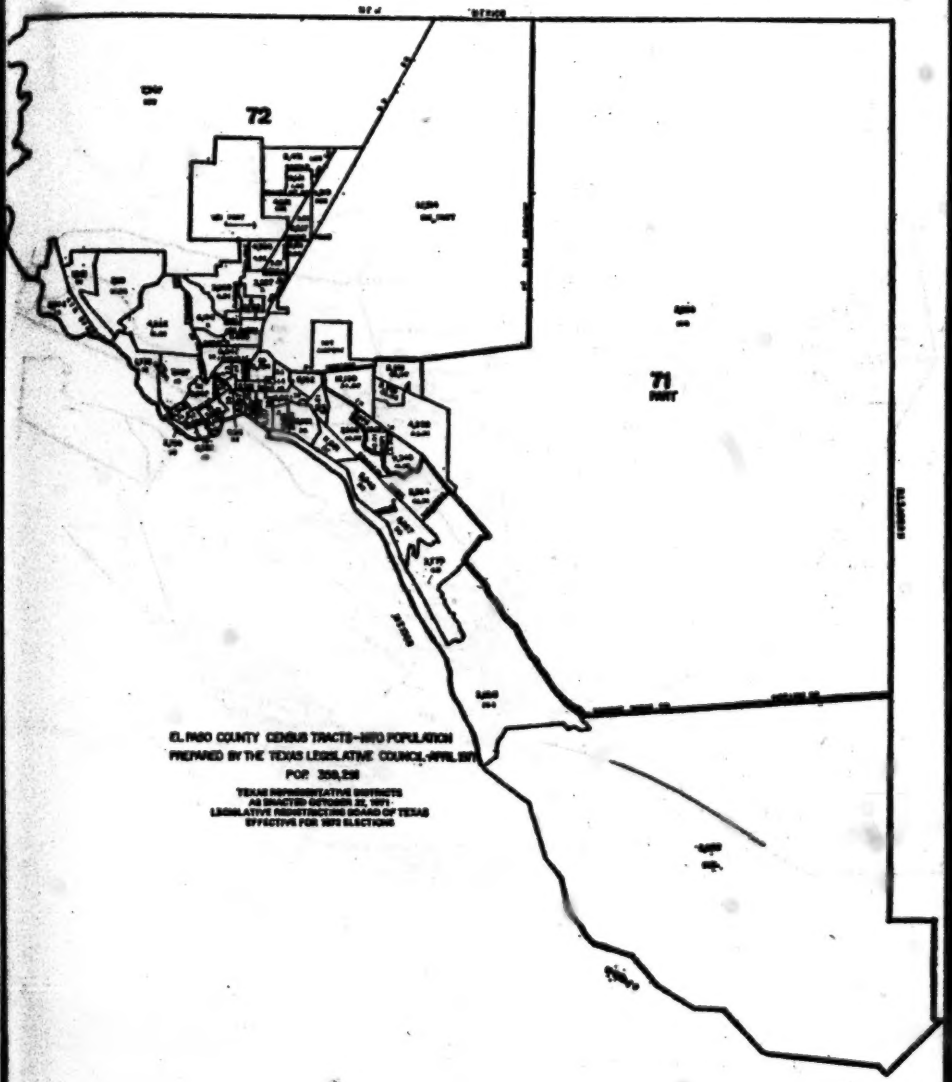


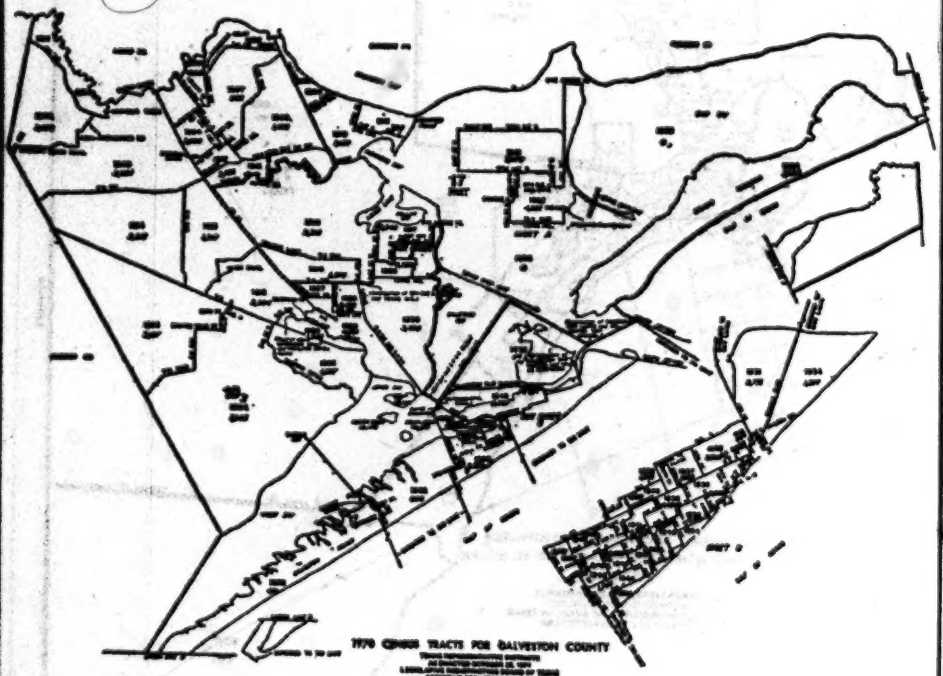
TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXA
EFFECTIVE FOR 1972 ELECTIONS

BRAZORIA COUNTY ENUMERATION DISTRICTS — 1970 POPULATION — COUNTY POPULATION 108,312

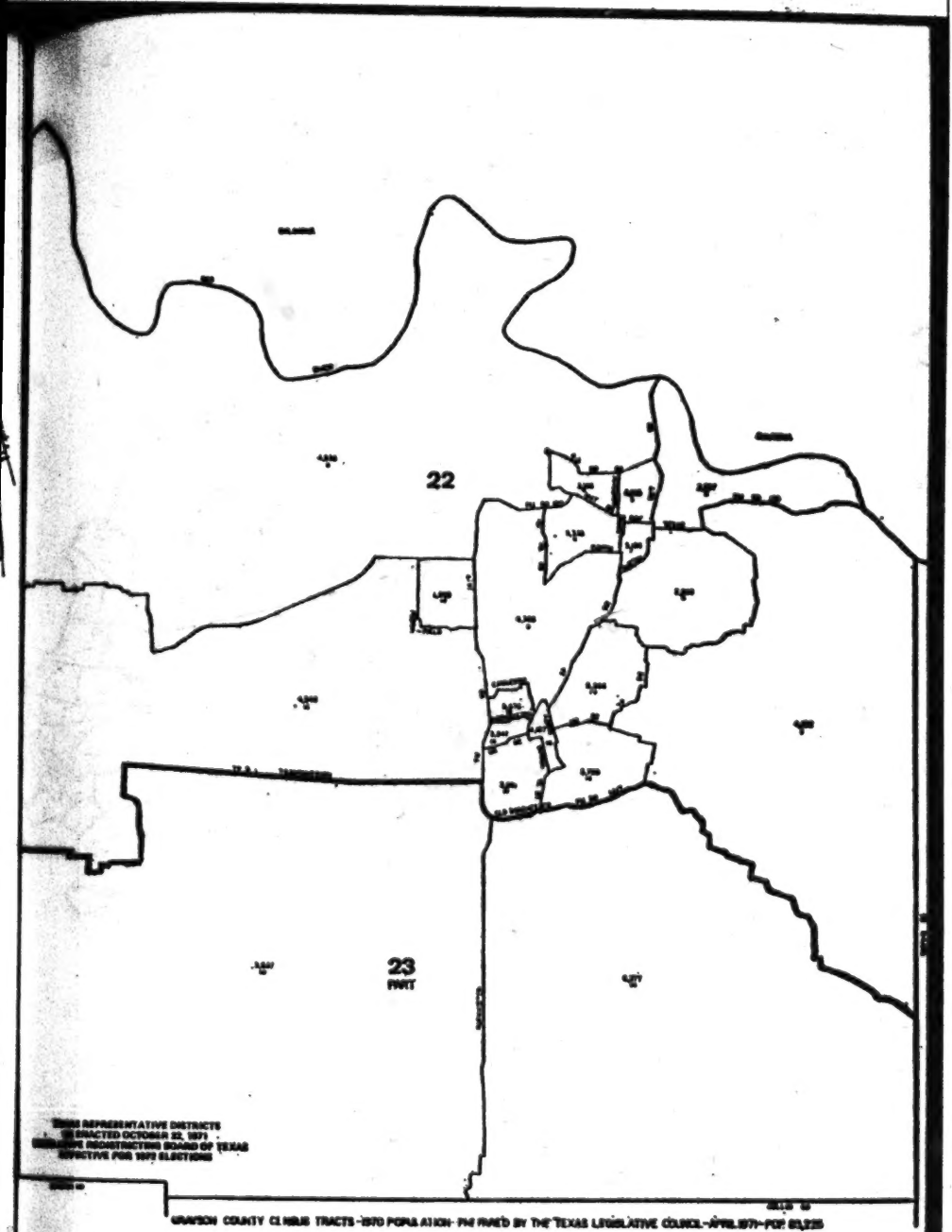

51
PART
50



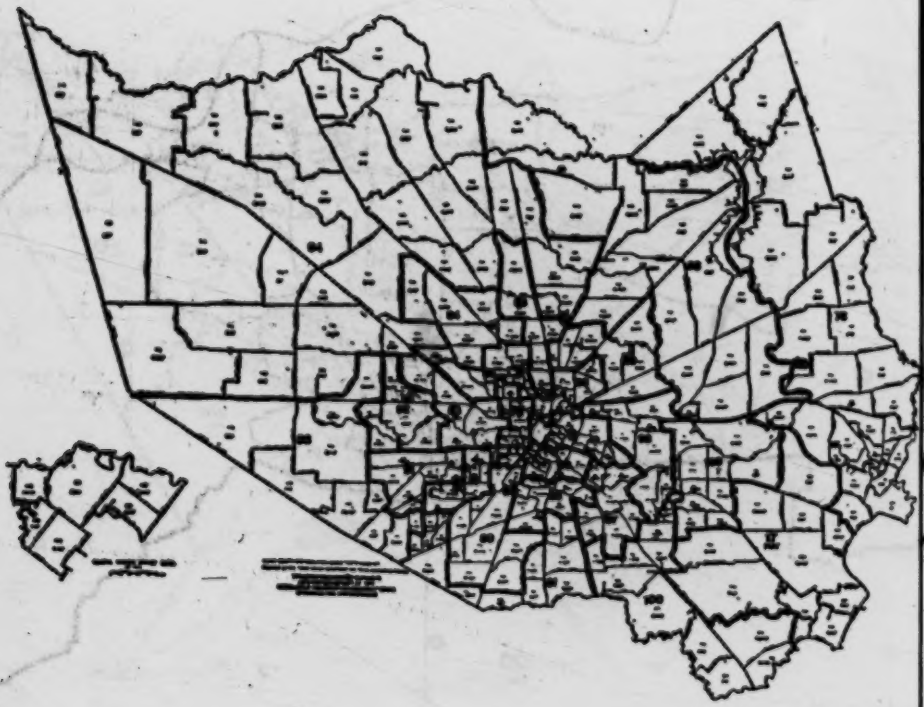

72
71
EL PASO COUNTY CENSUS TRACTS—1970 POPULATION
PREPARED BY THE TEXAS LEGISLATIVE COUNCIL

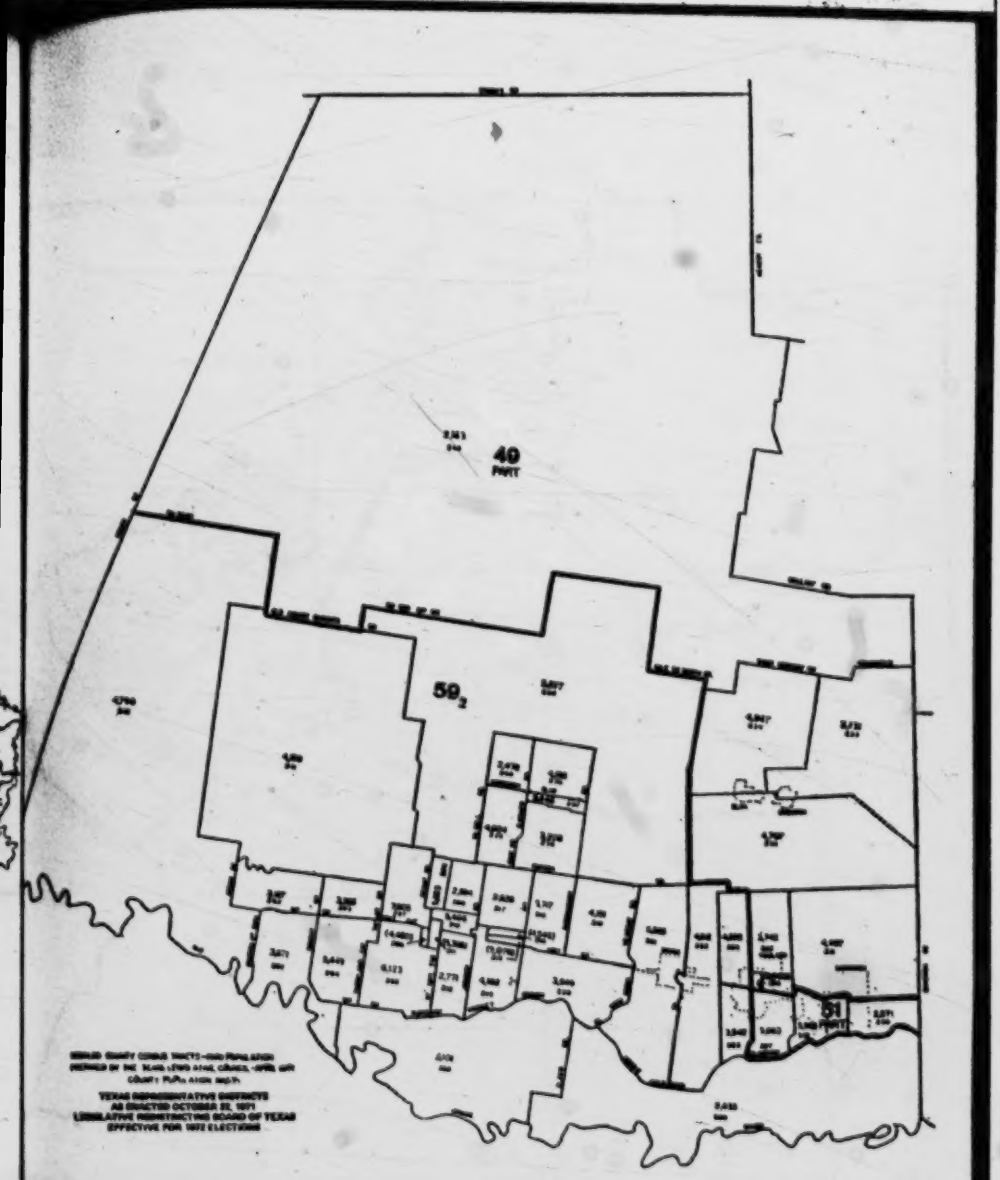


1970 CENSUS TRACTS FOR GALVESTON COUNTY



GRAYSON COUNTY CENSUS TRACTS-1970 POPULATION-PREPARED BY THE TEXAS LEGISLATIVE COUNCIL-APRIL 1971-POP. 83,225




49
PART
59
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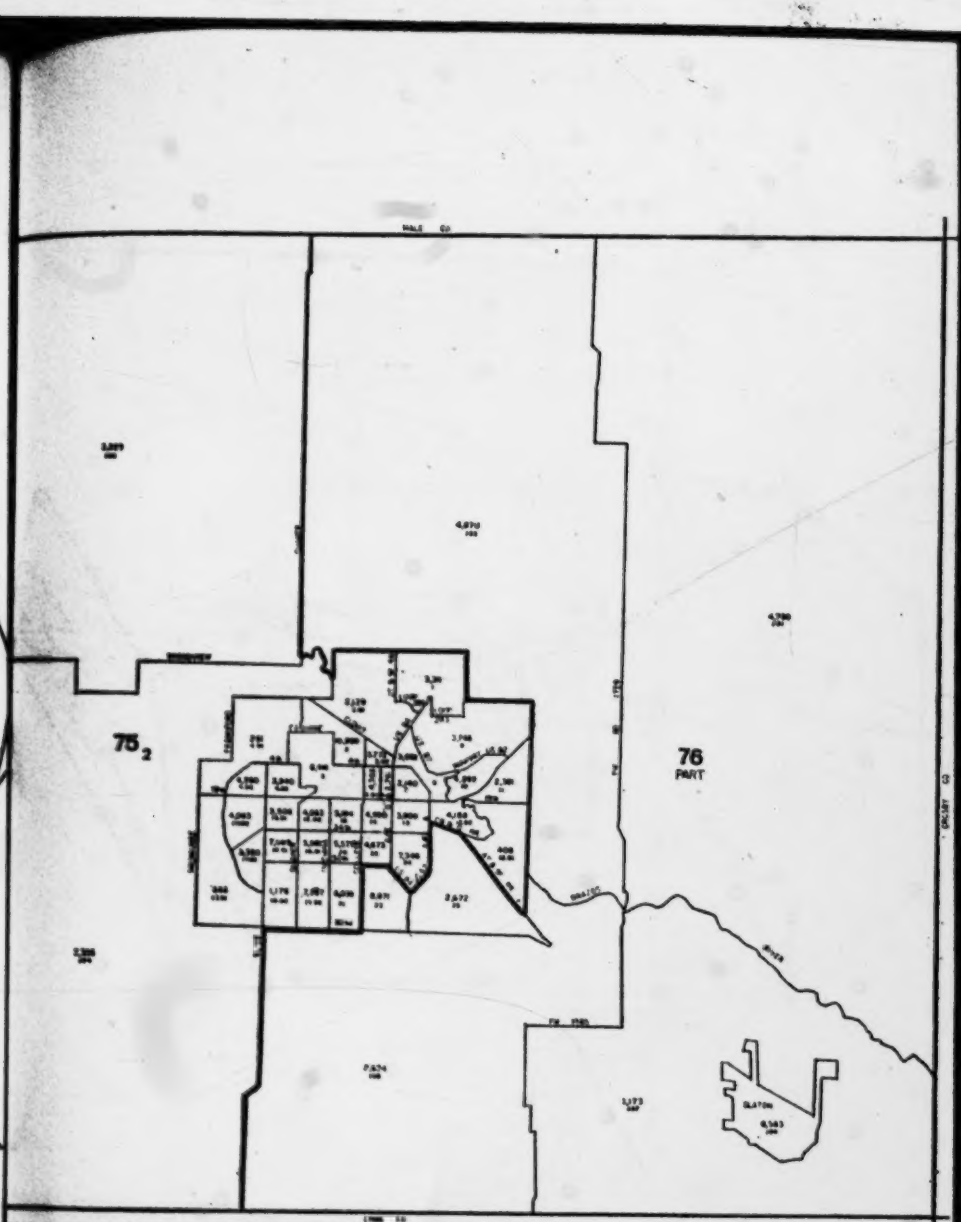
51
PART

JEFFERSON COUNTY CENSUS TRACTS—1970 POPULATION—ORDERED BY THE TEXAS LEGISLATIVE COUNCIL
APRIL 1971—COUNTY POPULATION 244,773

TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

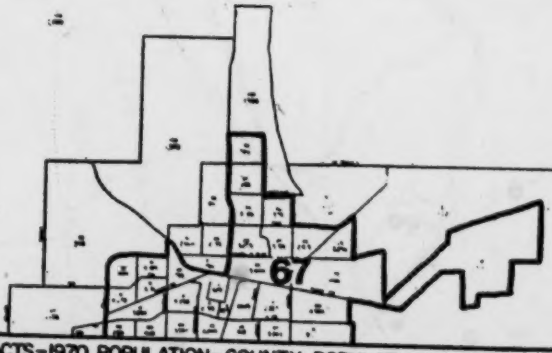


COUNTY CENSUS TRACTS—1970 POPULATION—PREPARED BY THE TEXAS LEGISLATIVE COUNCIL—APRIL 1971—COUNTY POPULATION 179,295

TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

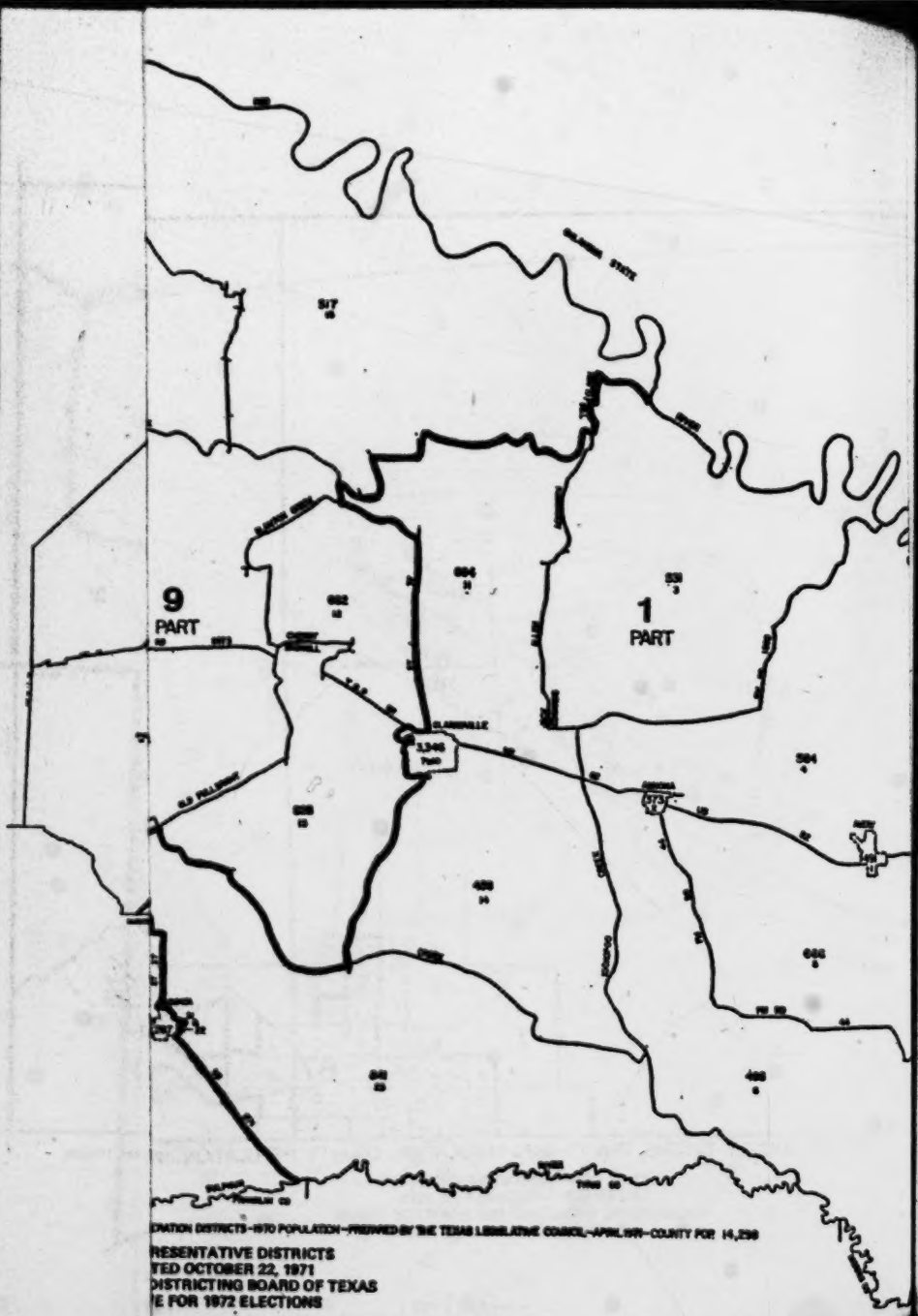
TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

65
PART



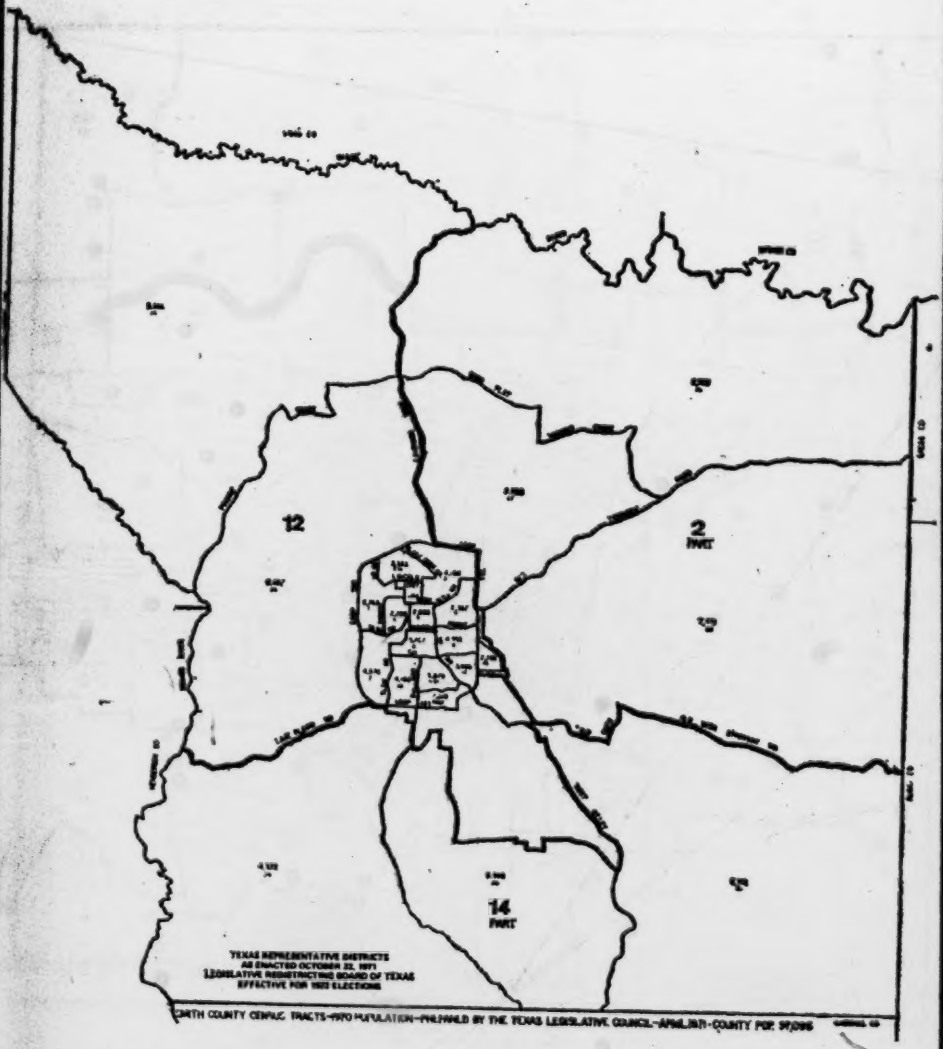
POTTER COUNTY CENSUS TRACTS-1970 POPULATION-COUNTY POPULATION 90,511

TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS



ATION DISTRICTS—1970 POPULATION—PREPARED BY THE TEXAS LEGISLATIVE COUNCIL—APRIL 1971—COUNTY FOR 14,259

RESENTATIVE DISTRICTS
TED OCTOBER 22, 1971
DISTRICTING BOARD OF TEXAS
E FOR 1972 ELECTIONS


12
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PART
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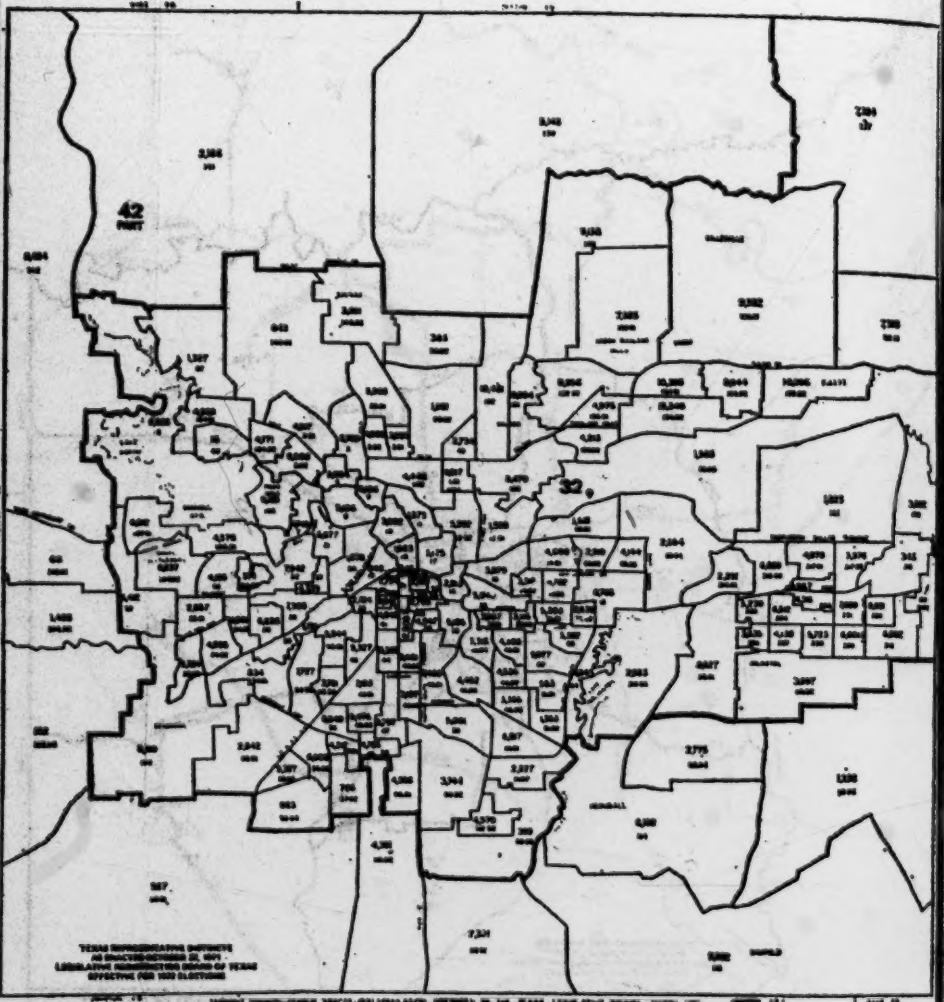
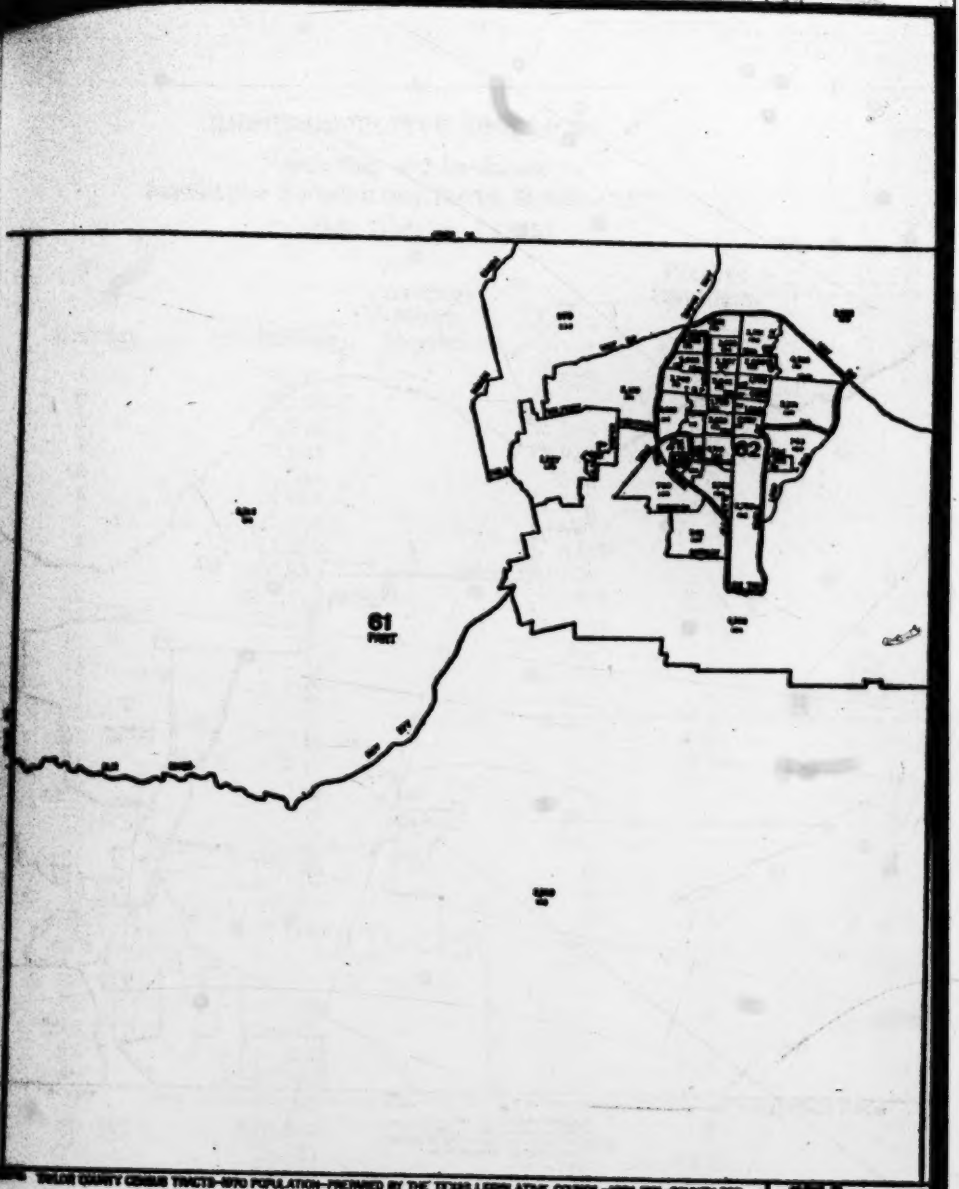
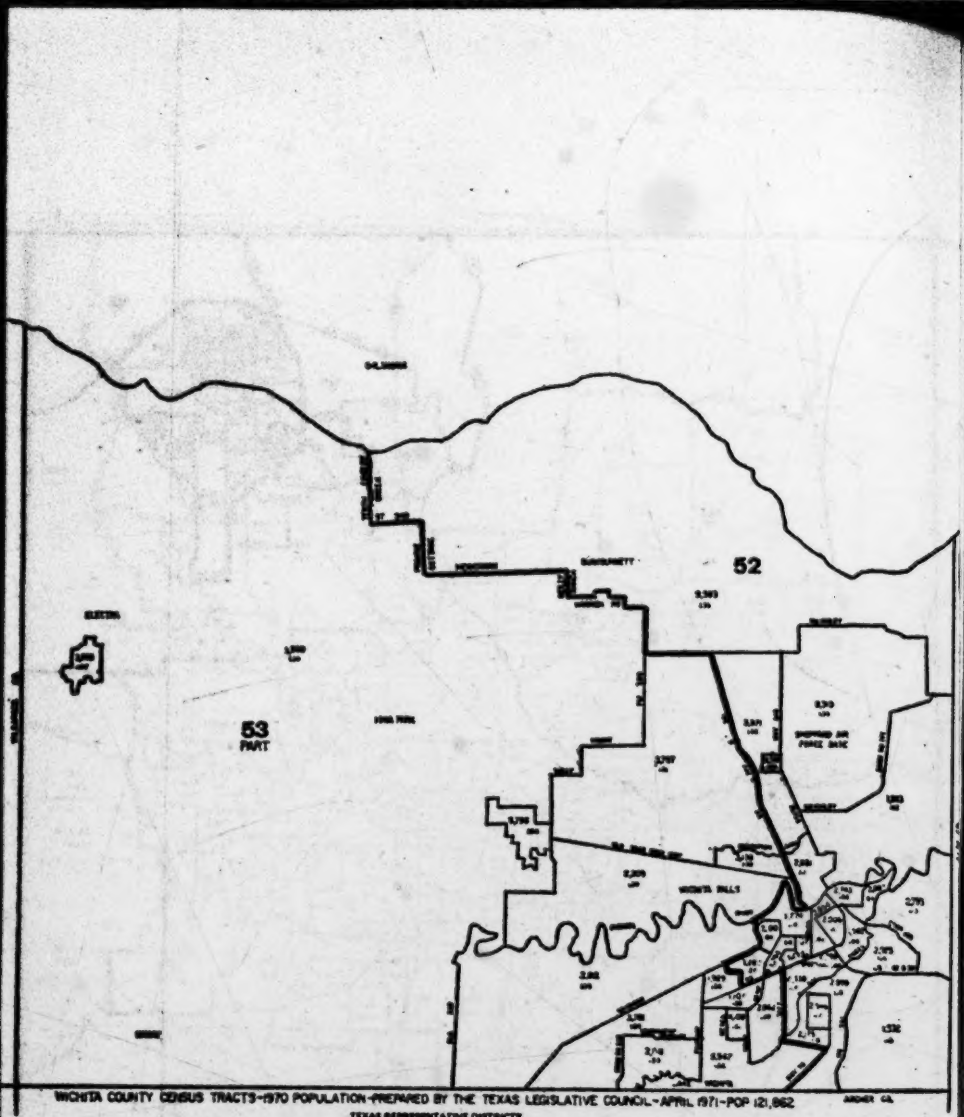
PART
TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS
SMITH COUNTY CENSUS TRACTS-1970 POPULATION-PREPARED BY THE TEXAS LEGISLATIVE COUNCIL-APPELLATE-COUNTY POP. 97,096


42
32
15



TAYLOR COUNTY CENSUS TRACTS-1970 POPULATION—PREPARED BY THE TEXAS LEGISLATIVE COUNCIL—APRIL 1971—COUNTY POP 97,809

TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 30, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS



WICHITA COUNTY CENSUS TRACTS-1970 POPULATION-PREPARED BY THE TEXAS LEGISLATIVE COUNCIL-APRIL 1971-POP 121,862

TEXAS REPRESENTATIVE DISTRICTS
AS ENACTED OCTOBER 22, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

REPRESENTATIVE DISTRICTS

Population and Deviation
Legislative Redistricting Board, October 1971
(Average District, 74,645)

District		Population	Average Multi-Member	(Under) Over	Percent Deviation Over (Under)
1		76,285		1,640	2.2
2		77,102		2,457	3.3
3		78,943		4,298	5.8
4		71,928		(2,717)	(3.6)
5		75,014		369	.5
6		76,051		1,406	1.9
7	(3)	221,314	73,771	(874)	(1.2)
8		74,303		(342)	(.5)
9		76,813		2,168	2.9
10		72,410		(2,235)	(3.0)
11		73,136		(1,509)	(2.0)
12		74,704		59	.1
13		75,929		1,284	1.7
14		76,597		1,952	2.6
15		76,701		2,056	2.8
16		74,218		(427)	(.6)
17		72,941		(1,704)	(2.3)
18		77,159		2,514	3.4
19	(2)	150,209	75,104	459	.6
20		75,592		947	1.3
21		74,651		6	.0
22		73,311		(1,334)	(1.8)
23		75,777		1,132	1.5
24		73,966		(679)	(.9)
25		75,633		988	1.3
26	(18)	1,327,321	73,740	(905)	(1.2)
27		77,788		3,143	4.2
28		72,367		(2,278)	(3.1)
29		76,505		1,860	2.5
30		77,008		2,363	3.2
31		75,025		380	.5
32	(9)	675,499	75,055	410	.5
33		73,071		(1,574)	(2.1)
34		76,071		1,426	1.9
35	(2)	147,553	73,777	(868)	(1.2)
36		74,633		(12)	(.0)
37	(4)	295,516	73,879	(766)	(1.0)
38		78,897		4,252	5.7
39		77,363		2,718	3.6
40		71,597		(3,048)	(4.1)

41		73,678		(967)	(1.3)
42		74,706		61	.1
43		74,160		(485)	(.6)
44		75,278		633	.8
45		78,090		3,445	4.6
46	(11)	826,698	75,154	509	.7
47		76,319		1,674	2.2
48	(3)	220,056	73,352	(1,293)	(1.7)
49		76,254		1,609	2.2
50		74,268		(377)	(.5)
51		75,800		1,155	1.5
52		76,601		1,956	2.6
53		74,499		(146)	(.2)
54		77,505		2,860	3.8
55		76,947		2,302	3.1
56		74,070		(575)	(.8)
57		77,211		2,566	3.4
58		75,120		475	.6
59	(2)	144,995	72,497	(2,148)	(2.9)
60		75,054		409	.5
61		73,356		(1,289)	(1.7)
62		72,240		(2,405)	(3.2)
63		75,191		546	.7
64		74,546		(99)	(.1)
65		75,720		1,075	1.4
66		72,310		(2,335)	(3.1)
67		75,034		389	.5
68		74,524		(121)	(.2)
69		74,765		120	.2
70		77,827		3,182	4.3
71		73,711		(934)	(1.3)
72	(4)	297,770	74,442	(203)	(.3)
73		74,309		(336)	(.5)
74		73,743		(902)	(1.2)
75	(2)	147,722	73,861	(784)	(1.1)
76		76,083		1,438	1.9
77		77,704		3,059	4.1
78		71,900		(2,745)	(3.7)
79		75,164		519	.7
80		75,111		466	.6
81		75,674		1,029	1.4
82		76,006		1,361	1.8
83		75,752		1,107	1.5
84		75,634		989	1.3
85		71,564		(3,081)	(4.1)
86		73,157		(1,488)	(2.0)
87		73,045		(1,600)	(2.1)
88		75,076		431	.6
89		74,206		(439)	(.6)
90		74,377		(268)	(.4)

91	73,381	(1,264)	(1.7)
92	71,908	(2,737)	(3.7)
93	72,761	(1,884)	(2.5)
94	73,328	(1,317)	(1.8)
95	73,825	(820)	(1.1)
96	72,505	(2,140)	(2.9)
97	74,202	(443)	(.6)
98	72,380	(2,265)	(3.0)
99	74,123	(522)	(.7)
100	75,682	1,037	1.4
101	75,204	559	.7

EXHIBIT D

APPORTIONMENT OF THE STATE OF TEXAS INTO SENATORIAL DISTRICTS

WHEREAS, The Regular Session of the 62nd Legislature of the State of Texas was adjourned sine die on May 31, 1971; and

WHEREAS, During that Regular Session, which constituted the first Regular Session after the publication of the 1970 United States Decennial census, the Legislature failed to apportion the state into senatorial districts; and

WHEREAS, In such an event Article III, Section 28, of the Texas Constitution, requires that

> . . . same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within six (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding state-wide general election.

and

WHEREAS, The Legislative Redistricting Board

of Texas assembled in the City of Austin on August 24, 1971; now, therefore,

BE IT ENACTED BY THE LEGISLATIVE REDISTRICTING BOARD OF TEXAS:

Section 1. The State of Texas is apportioned into senatorial districts as provided in the following sections. Each district is entitled to elect one member to the Senate of the State of Texas.

Sec. 2. District 1 is composed of Bowie, Camp, Cass, Delta, Fannin, Franklin, Grayson, Harrison, Hopkins, Lamar, Marion, Morris, Red River and Titus Counties.

Sec. 3. District 2 is composed of Collin, Gregg, Hunt, Rains, Rockwall, Smith, Upshur, Van Zandt and Wood Counties.

Sec. 4. District 3 is composed of Anderson, Angelina, Cherokee, Hardin, Henderson, Jasper, Kaufman, Nacogdoches, Newton, Panola, Rusk, Sabine, San Augustine, Shelby and Tyler Counties.

Sec. 5. District 4 is composed of Chambers, Jefferson, Liberty and Orange Counties.

Sec. 6. District 5 is composed of Austin, Brazos, Burleson, Colorado, Falls, Freestone, Grimes, Houston, Leon, Madison, Montgomery, Polk, Robertson, San Jacinto, Trinity, Walker, Waller, Washington and Wharton Counties.

Sec. 7. District 6 is composed of that part of Harris County included in census tracts 203, 209, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 234, 235, 236, 238, 239, 240, 241, 519, 520, 521, 522, 523, 524, 525, 526, 530, 531, 532, 533, 534, 539 and 540.

Sec. 8. District 7 is composed of Fort Bend County

and that part of Harris County included in census tracts 314, 318, 319, 320, 323, 324, 325, 326, 327, 328, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 348, 371, 372, 375, 408, 409, 410, 411, 412, 413, 414, 415, 416, 428, 429, 430 and 431

Sec. 9. District 8 is composed of that part of Dallas County included in census tracts 4.01, 4.02, 4.03, 5, 6.01, 17.01, 17.02, 18, 19, 21, 31.01, 32.01, 71.01, 71.02, 72, 73.01, 73.02, 74, 75.01, 75.02, 76.01, 76.02, 76.03, 94, 95, 96.01, 96.02, 96.03, 96.04, 97, 98, 99, 132, 134.01, 134.02, 135, 136.01, 136.02, 136.03, 137.01, 137.02, 137.03, 137.04, 137.05, 138.01, 138.02, 139, 140.01, 140.02, 141.01, 141.02, 141.03, 141.04, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153.01, 153.02, 192.02, 192.03, 192.04, 192.05, 192.06, 192.07, 193.01, 193.02, 194, 195.01 and 195.02.

Sec. 10. District 9 is composed of Ellis, Limestone and Navarro Counties and that part of Dallas County included in census tracts, 92.01, 92.02, 93.01, 116, 117, 118, 119, 130,01, 130.02, 165.02, 165.03, 165.04, 165.05, 166.01, 166.02, 166.03, 166.04, 167.02, 168, 169.01, 169.02, 169.03, 169,04, 170, 171, 172, 173.01, 173.02, 174, 177, 178.01, 178.02, 181.01, 181.02, 181.03, 181.04, 182, 183, 184, 185.01, 185.02, 186, 187, 188, 189, 190.01, 190.02, 190.03, 190.04, 190.05, 190.06, 190.07, 191 and 192.01.

Sec. 11. District 10 is composed of that part of Tarrant County included in census tracts 1.01, 1.02, 2.01, 2.02, 3, 4, 5.01, 5.02, 6, 7, 8, 9, 10, 11, 12.01, 12.02, 13, 14.01, 14.02, 14.03, 15, 16, 17, 18, 19, 20, 21, 31, 32, 33, 34, 35, 36.01, 36.02, 37.01, 37.02, 38, 39, 49, 50.01, 50.02, 50.03, 65.01, 65.02, 65.03, 65.04, 65.05, 66, 67, 101, 102, 103, 104.01, 104.02, 105, 106.01, 107,01, 107.02, 132.01, 132.02, 133.01, 133.02, 134.01, 134.02, 135,01, 135.02, 136.01, 136.02, 137, 138, 139, 140.01, 140.02, 141 and 142.

Sec. 12. District 11 is composed of that part of Har-

ris County included in census tracts 121, 122, 123, 124, 201, 202, 204, 205, 210, 211, 232, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 315, 317, 321, 322, 329, 330, 347, 349, 350, 351, 352, 353, 356, 357, 358, 359, 370 and 501.

Sec. 13. District 12 is composed of that part of Tarrant County included in census tracts 22, 23.01, 23.02, 24.01, 24.02, 25, 26, 27, 28, 29, 30, 40, 41, 42.01, 42.02, 43, 44, 45.01, 45.02, 45.03, 46.01, 46.02, 46.03, 46.04, 46.05, 47, 48.01, 48.02, 51, 52, 53, 54,01, 54.02, 55.01, 55.02, 55.03, 55.04, 56, 57.01, 57.02, 58, 59, 60.01, 60.02, 60.03, 61.01, 61.02, 62, 63, 64, 106.02, 108.01, 108.02, 108,03, 109, 110.01, 110.02, 111.01, 111.02, 112.01, 112.02, 113, 114, 115.01, 115.02, 115.03, 115.04, 130, 131, 216.01, 216.02, 216.03, 217.01, 217.02, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228 and 229.

Sec. 14. District 13 is composed of that part of Harris County included in census tracts 233, 237, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 354, 355, 360, 361, 362, 363, 364, 365, 366, 367, 417, 418, 419, 420, 422, 423, 424, 425, 426, 427, 432, 433, 434, 435, 436, 437, 438, 439, 445, 446, 448, 449, 450, 451, 452, 535, 536, 537, 538, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558 and 559.

Sec. 15. District 14 is composed of Blanco, Burnet, Caldwell, Hays and Travis Counties.

Sec. 16. District 15 is composed of that part of Harris County included in census tracts 125, 126, 206, 207, 208, 316, 401, 402, 403, 404, 405, 406, 407, 421, 440, 441, 442, 443, 444, 447, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 527, 528 and 529.

Sec. 17. District 16 is composed of that part of Dallas County included in census tracts 1, 2.01, 2.02, 3, 6.02, 7.01, 7.02, 8, 9, 10, 11.01, 11.02, 12, 13.01, 13.02, 14, 15.01, 15.02, 16, 22.01, 22.02, 23, 24, 25, 26, 27.01, 27.02, 28, 29, 30, 31.02, 33, 34, 35, 36, 37, 38, 39.01, 39.02, 76.04, 77, 78.01, 78.02, 78.03, 79.01, 79.02, 80, 81, 82, 83, 84, 85, 90.01, 90.02, 91.01, 91.02, 115, 120, 121, 122.01, 122.02, 123, 124, 125, 126, 127, 128, 129, 131, 133, 175, 176.01, 176.02, 179, 180, 196, 197 and 198.

Sec. 18. District 17 is composed of Aransas, Brazoria, Calhoun, Galveston and Matagorda Counties, and that part of Harris County included in census tracts 368, 369, 373 and 374.

Sec. 19. District 18 is composed of Bastrop, Bell, DeWitt, Fayette, Goliad, Gonzales, Jackson, Karnes, Lavaca, Lee, Milam, Victoria and Williamson Counties.

Sec. 20. District 19 is composed of that part of Bexar County included in census tracts, 1,101, 1,102, 1,103, 1,104, 1,108, 1,109, 1,110, 1,201, 1,202, 1,205, 1,213, 1,214, 1,215, 1,216, 1,301, 1,302, 1,303, 1,304, 1,305, 1,306, 1,307, 1,308, 1,309, 1,310, 1,311, 1,312, 1,313, 1,314, 1,315, 1,316, 1,317, 1,318, 1,401, 1,402, 1,403, 1,404, 1,405, 1,406, 1,407, 1,408, 1,409, 1,410, 1,411, 1,412, 1,413, 1,414, 1,415, 1,416, 1,417, 1,418, 1,419, 1,501, 1,502, 1,503, 1,504, 1,505, 1,506, 1,507, 1,508, 1,509, 1,510, 1,511, 1,512, 1,513, 1,514, 1,515, 1,516, 1,517, 1,518, 1,519, 1,520, 1,521, 1,522, 1,602, 1,603, 1,604, 1,608, 1,609, 1,610, 1,611, 1,612, 1,620, 1,902, 1,903 and 1,904.

Sec. 21. District 20 is composed of Bee, Kenedy, Kleberg, Nueces, Refugio, San Patricio and Willacy Counties.

Sec. 22. District 21 is composed of Atascosa, Dimmit, Duval, Frio, Guadalupe, Jim Hogg, LaSalle, Live Oak, McMullen, Maverick, Medina, Starr, Webb, Wil-

son, Zapata and Zavala Counties, and that part of Bexar County included in census tracts, 1,203, 1,204, 1,206, 1,207, 1,208, 1,209, 1,210, 1,211, 1,212, 1,217, 1,218, 1,219, 1,613, 1,615, 1,617, 1,618, 1,619, 1,717, 1,718, 1,719, 1,720, 1,817, 1,821, 1,916 and 1,917.

Sec. 23. District 22 is composed of Bosque, Comanche, Cooke, Denton, Eastland, Erath, Hill, Hood, Jack, Johnson, Montague, Palo Pinto, Parker, Somervell, Stephens, Wise and Young Counties.

Sec. 24. District 23 is composed of that part of Dallas County included in census tracts 20, 32.02, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59.01, 59,02, 60.01, 60.02, 61, 62, 63.01, 63.02, 64, 65, 67, 68, 69, 86, 87.01, 87.02, 88, 89, 93.02, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111.01, 111.02, 112, 113, 114.01, 114.02, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165.01, 167.01 and 199.

Sec. 25. District 24 is composed of Brown, Coleman, Concho, Coryell, Hamilton, Lampasas, McCulloch, McLennan, Menard, Mills, Runnels, San Saba and Taylor Counties.

Sec. 26. District 25 is composed of Bandera, Brewster, Coke, Comal, Crane, Crockett, Culberson, Edwards, Gillespie, Glasscock, Irion, Jeff Davis, Kendall, Kerr, Kimble, Kinney, Llano, Loving, Mason, Midland, Pecos, Presidio, Reagan, Real, Reeves, Schleicher, Sterling, Sutton, Terrell, Tom Green, Upton, Uvalde, Val Verde, Ward and Winkler Counties.

Sec. 27. District 26 is composed of that part of Bexar County included in census tracts, 1,105, 1,106, 1,107, 1,601, 1,605, 1,606, 1,607, 1,616, 1,614, 1,701, 1,702, 1,703, 1,704, 1,705, 1,706, 1,707, 1,708, 1,709, 1,710, 1,711, 1,712, 1,713, 1,714, 1,715, 1,716, 1,801, 1,802, 1,803, 1,804, 1,805, 1,806, 1,807, 1,808, 1,809, 1,810, 1,811, 1,812,

1,813, 1,814, 1,815, 1,816, 1,818, 1,819, 1,820, 1,901, 1,905, 1,906, 1,907, 1,908, 1,909, 1,910, 1,911, 1,912, 1,913, 1,914 and 1,915.

Sec. 28. District 27 is composed of Brooks, Cameron, Hidalgo and Jim Wells Counties.

Sec. 29. District 28 is composed of Andrews, Borden, Cochran, Crosby, Dawson, Ector, Gaines, Garza, Lubbock, Lynn, Martin, Terry and Yoakum Counties.

Sec. 30. District 29 is composed of El Paso and Hudspeth Counties.

Sec. 31. District 30 is composed of Archer, Baylor, Briscoe, Callahan, Childress, Clay, Cottle, Dickens, Fisher, Floyd, Foard, Hale, Hall, Hardeman, Haskell, Howard, Jones, Kent, King, Knox, Mitchell, Motley, Nolan, Scurry, Shackelford, Stonewall, Throckmorton, Wichita and Wilbarger Counties.

Sec. 32. District 31 is composed of Armstrong, Bailey, Carson, Castro, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hansford, Hartley, Hemphill, Hockley, Hutchinson, Lamb, Lipscomb, Moore, Ochiltree, Oldham, Parmer, Potter, Randall, Roberts, Sherman, Swisher and Wheeler Counties.

Sec. 33. The terms "census tract" and "census enumeration district," as used in this act, mean those geographic areas outlined and identified as such on official place, county, and metropolitan map series maps prepared by the United States Department of Commerce Bureau of the Census for the Nineteenth Decennial Census of the United States, enumerated as of April 1, 1970. "Block groups" are subdivisions of census tracts as defined on census metropolitan maps which differentiate block groups by the first digit of the block numbers assigned to city blocks within each tract.

Sec. 34.(a) As soon as possible after this act is filed with the secretary of state, the secretary of state shall transmit a copy of the act to the county clerk of each county in the state, to be filed as an official public record in the office of the county clerk. At the same time, the secretary of state shall also furnish to the county judge of each county which is divided into two or more senatorial districts or parts of two or more senatorial districts appropriate maps showing census tract, census enumeration district, or census block group lines to facilitate the identification of senatorial district boundaries.

The county judge shall present the maps to the commissioners court, to be used in making whatever changes are necessary in election precinct boundaries in order to comply with the prohibition in Subsection (b), Section 12, Texas Election Code (Article 2.04, Vernon's Texas Election Code), which reads in relevant part as follows:

"(b) No election precinct shall be formed out of two or more justice precincts or commissioners precincts, nor out of the parts of two or more justice precincts or commisisoners precincts; and no election precinct shall be formed out of two or more congressional districts or state senatorial districts or state representative districts, nor out of the parts of two or more such districts. . . . Subject to the provisions of the first sentence of this paragraph, no election precinct shall have resident therein less than fifty or more than two thousand voters as ascertained by the number of registered voters for the last preceding presidential general election year; provided, however, that in precincts in which voting machines have been adopted for use in accordance with Section 79 of this code, the maximum number of voters shall be three thousand."

(b) Although the time specified in Subsection (b) of Article 2.04 of the Texas Election Code, for making changes in election precint boundaries has passed, in order to make the apportionment districts adopted by the Legislative Redistricting Board effective for the next election year in compliance with the mandate of Section 28 of Article III of the Constitution of the State of Texas, the commissioners courts, within 30 days after the date the maps are mailed by the secretary of state as required by Subsection (a) of this section, shall make such changes in the boundaries of the election precincts of their respective counties as may be necessary to comply with the above quoted provision of Subsection (b) of Article 2.04 of the Texas Election Code.

Such changes in the election precinct boundaries shall become operative in the holding of elections on and after March 1, 1972, and registration of voters for voting at elections held during the 1972 voting year shall conform to the changes. Where changes in election precincts are necessary, the county tax assessor-collector as registrar of voters shall defer the issuance of registration certificates for voters residing in the affected areas until the changes have been made. The registrar is further directed to make all necessary corrections in the registration records for the voting period which begins on March 1, 1972, as provided in Section 48b, Texas Election Code, as added by Section 9, Chapter 827, Acts of the 62nd Legislature, Regular Session, 1971 (Article 5.16b, Vernon's Texas Election Code). Any and all acts required of any other state or county officer as a result of changes made in the election precincts as necessitated by this act may be delayed accordingly, but only for the period of time necessary to accomplish the acts required.

Sec. 35. The apportionment plan adopted by the Legislative Redistricting Board is effective for the elections, primary and general, for all senators to the 63rd Legislature, and continues in effect for succeeding legislatures. This apportionment plan does not affect the membership of the 62nd Legislature. If a vacancy occurs in the office of any senator of the 62nd Legislature and a special election to fill the vacancy becomes necessary, the election shall be held in the district as it existed before the effective date of this act.

Sec. 36. All boards, agencies, commissions, committees, and governing bodies created or existing under the laws of this state whose membership is based upon the senatorial districts of Texas shall conform their membership to the senatorial districts created hereunder.

WE, THE UNDERSIGNED, hereby acknowledge the foregoing instrument to be the act and deed of the Legislative Redistricting Board of Texas, executed on this 15th day of October A.D. 1971.

s/
CRAWFORD C. MARTIN, Chairman
Attorney General of Texas

s/
BEN BARNES
Lieutenant Governor of Texas

G. F. (GUS) MUTSCHER, Speaker
House of Representatives of Texas

BOB ARMSTRONG
Commissioner of the General Land Office of Texas

s/
ROBERT S. CALVERT
Comptroller of Public Accounts of Texas

THE STATE OF TEXAS)
)
COUNTY OF TRAVIS)

Before me on this day personally appeared the above signed members of the Legislative Redistricting Board of Texas known to me to be the persons and officers whose names are subscribed to the foregoing instrument and acknowledged to me that they and each of them executed the same as the act and deed of the Legislative Redistricting Board of Texas.

Given under my hand and seal of office this 15th day of October A.D. 1971.

s/
JAMES R. REYNOLDS
Notary Public in and for Travis County, Texas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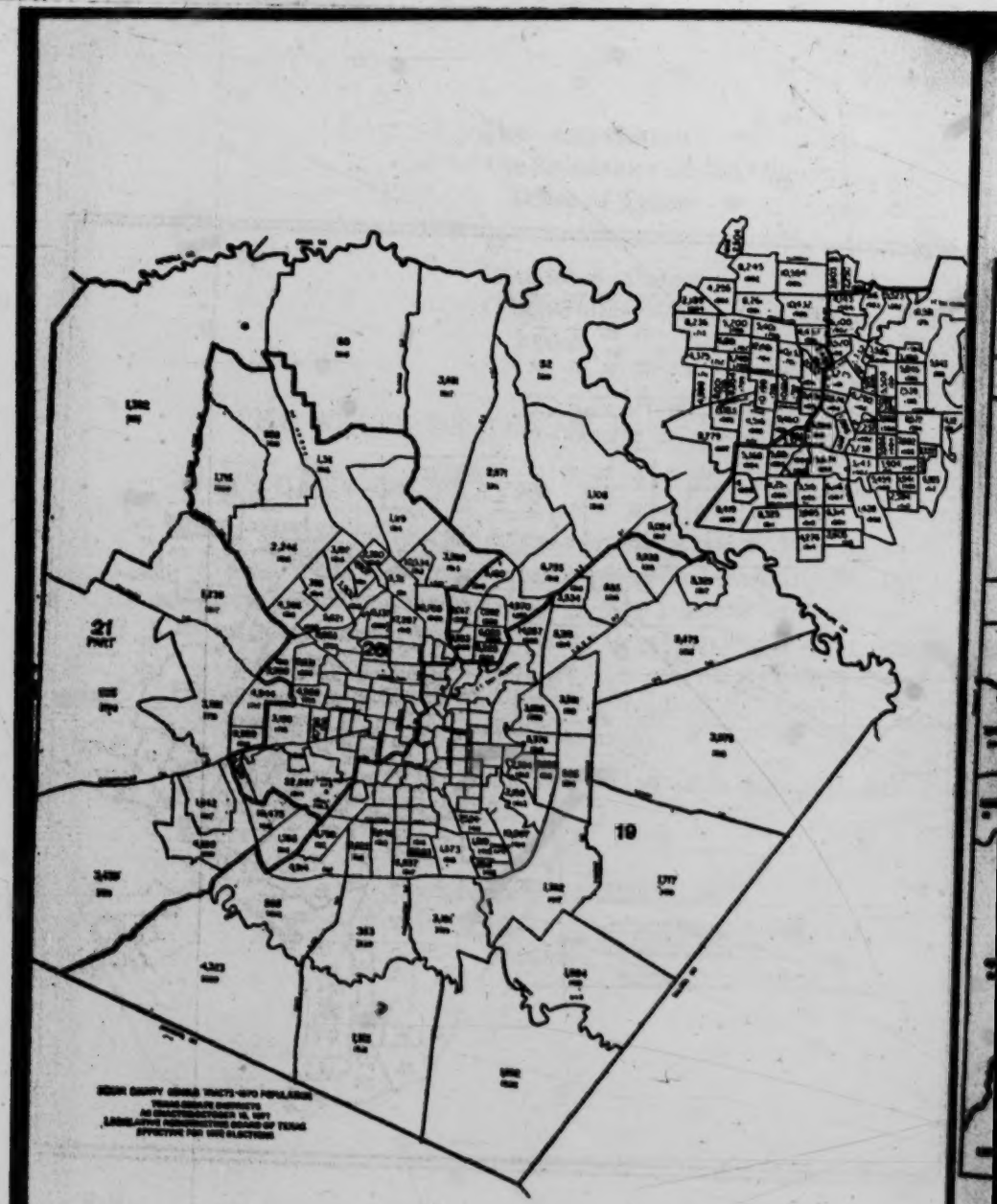
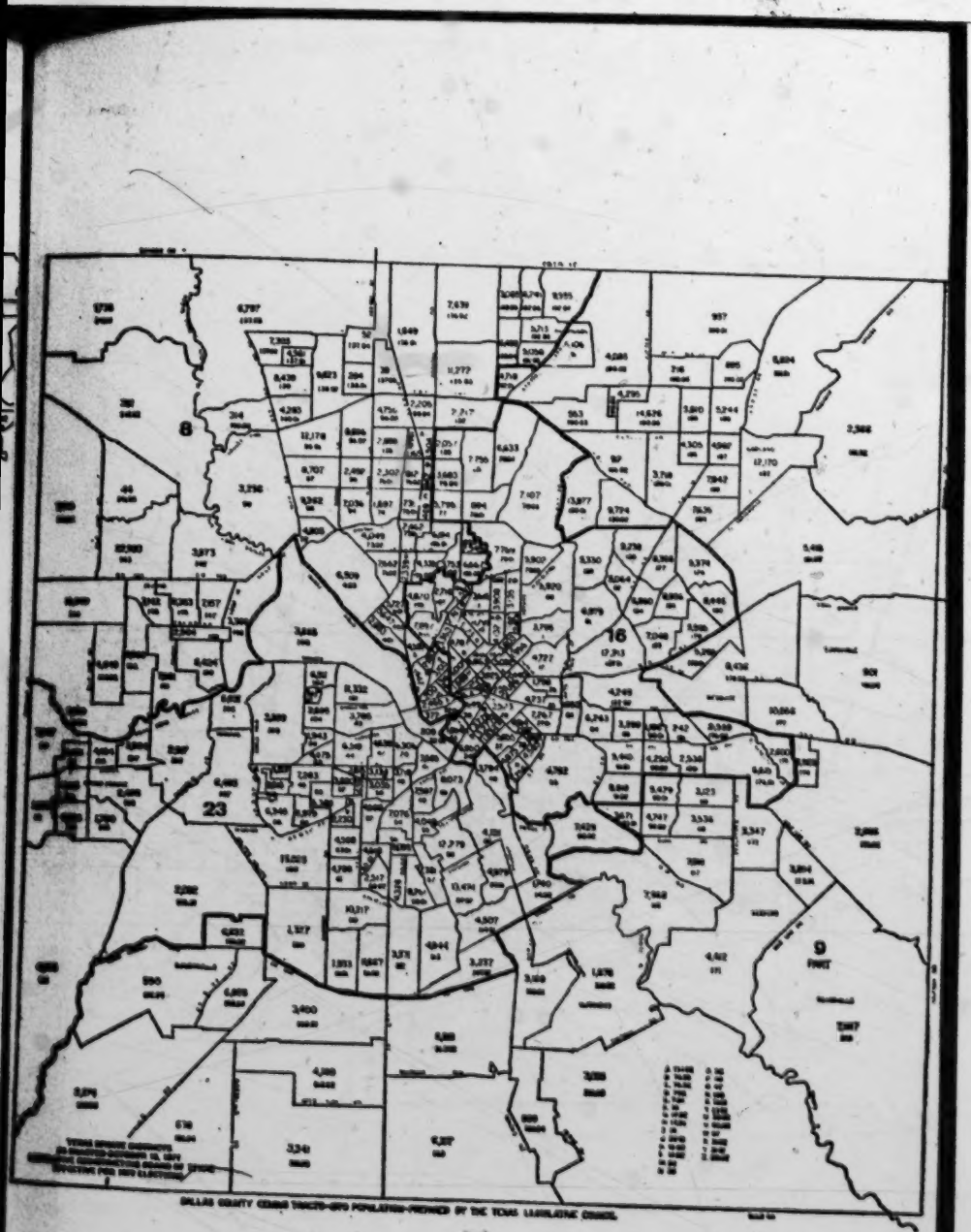
TEXAS SENATE DISTRICTS
AS ENACTED OCTOBER 12, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS

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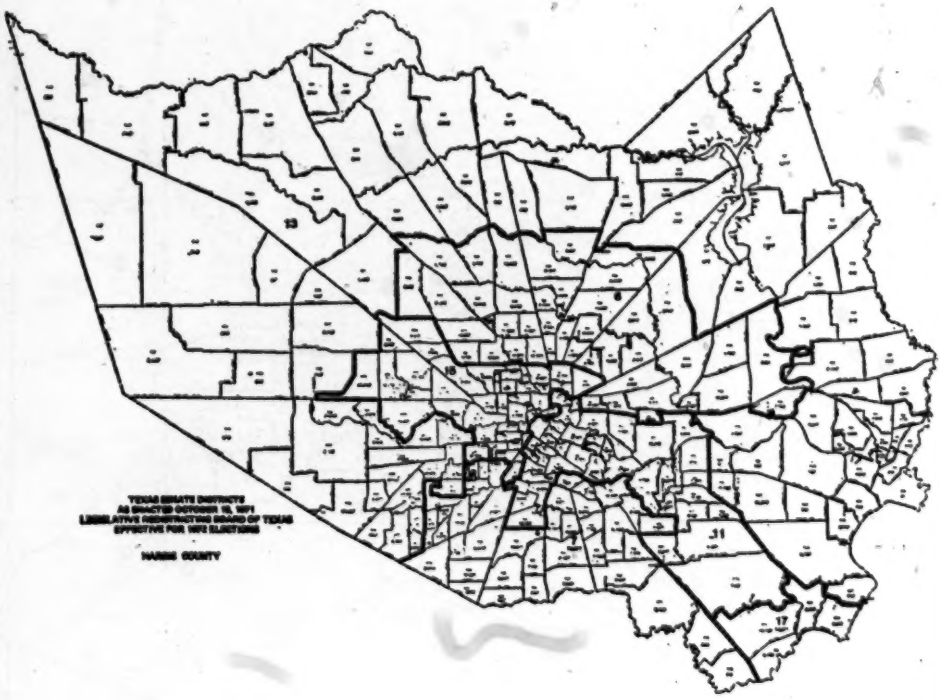
TEXAS SENATE DISTRICTS
AS ENACTED OCTOBER 13, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS
HARRIS COUNTY
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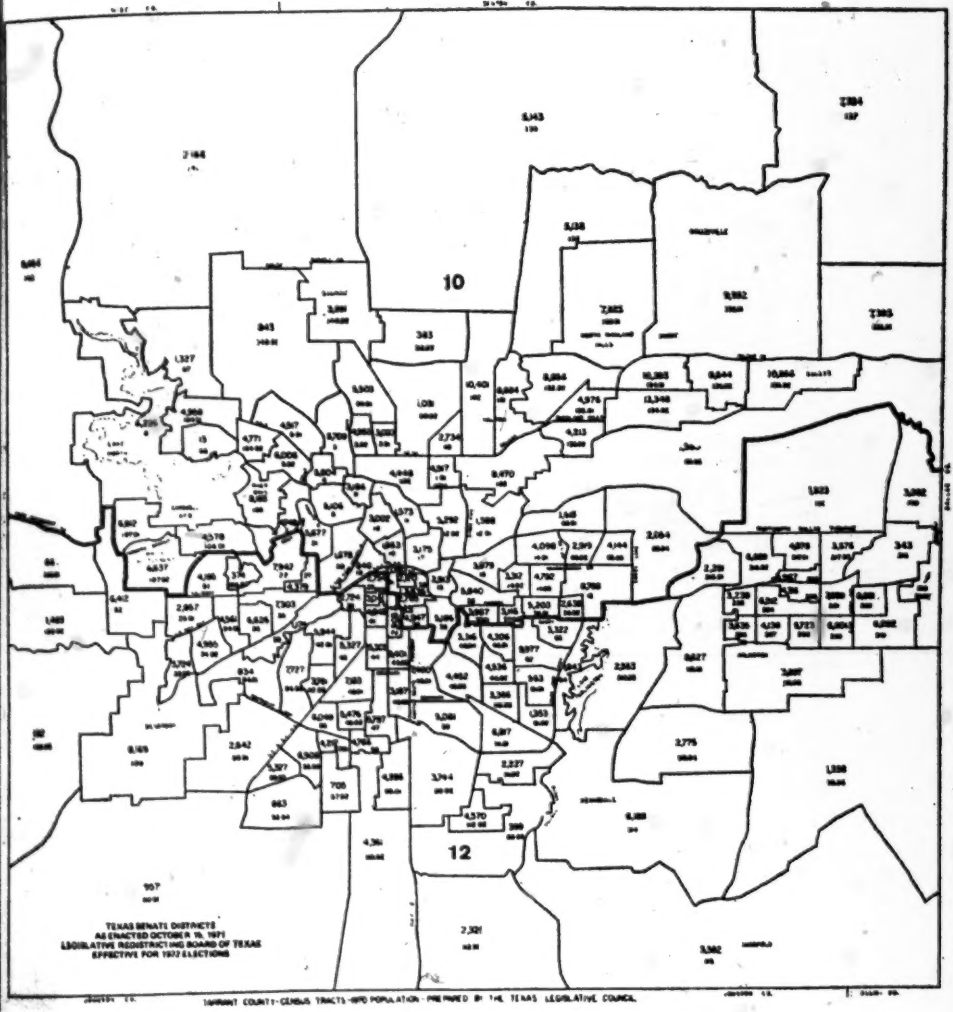
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TEXAS SENATE DISTRICTS
AS ENACTED OCTOBER 19, 1971
LEGISLATIVE REDISTRICTING BOARD OF TEXAS
EFFECTIVE FOR 1972 ELECTIONS
TARRANT COUNTY - CENSUS TRACTS - 1970 POPULATION - PREPARED BY THE TEXAS LEGISLATIVE COUNCIL

TEXAS SENATE DISTRICTS

AS ENACTED OCTOBER 15, 1971 BY THE LEGISLATIVE REDISTRICTING BOARD OF TEXAS

District		Total Population	Percent Deviation Over (Under)
1		369,539	2.3%
2		360,411	(.2%)
3		367,841	1.8%
4		361,144	(.01%)
5		364,194	.8%
6	(HARRIS)	353,448	(2.1%)
7	(HARRIS 302,083)	354,397	(1.9%)
8	(DALLAS)	355,361	(1.6%)
9	(DALLAS 258,657)	354,545	(1.8%)
10	(TARRANT)	358,138	(.8%)
11	(HARRIS)	354,342	(1.9%)
12	(TARRANT)	358,179	(.8%)
13	(HARRIS)	353,326	(2.2%)
14		359,323	(.5%)
15	(HARRIS)	354,218	(1.9%)
16	(DALLAS)	357,291	(1.1%)
17	(HARRIS 24,495)	357,265	(1.1%)
18		362,821	.5%
19	(BEXAR)	361,439	.1%
20		366,477	1.5%
21	(BEXAR 108,490)	367,791	1.8%
22		364,115	.8%
23	(DALLAS)	356,012	(1.4%)
24		369,417	2.3%
25		367,975	1.9%
26	(BEXAR)	360,531	(.2%)
27		362,940	.5%
28		365,600	1.2%
29		361,683	.1%
30		368,807	2.1%
31		368,160	1.9%
	TOTAL	11,196,730	

EXHIBIT E

TEXAS CONSTITUTION

Article III, Section 25, Senatorial Districts

Sec. 25. The State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors, as nearly as may be, and each district shall be entitled to elect one Senator; and no single county shall be entitled to more than one Senator.

INTERPRETATIVE COMMENTARY

As noted here senatorial districts are divided according to the number of qualified electors, hence representation in the senate is apportioned upon a basis of the number of qualified electors, rather than upon a basis of population as in the House of Representatives.

This plan of apportionment in the Senate was included in the Constitution of 1845 in Article III, Section 31. Qualified electors at that time were free male citizens of twenty-one years of age (Indians not taxed and Africans and their descendants excepted). Such a plan was no doubt adopted to aid in giving greater senatorial representation to the sparsely settled areas of the state, thus effecting a balance in the senate between such areas and the more thickly populated areas, which would not be the case if apportionment was carried out on a population or free inhabitant basis (Indians not taxed and Africans and their descendants excluded) as was used in apportioning Representatives.

This basis of representation has been carried on in all later constitutions including that of 1876, although today when qualified electors are in general all citizens of twenty-one years, the distinction as to representation is not of sufficient importance to have much validity, for representation based on qualified electors is about the same proportionately as represenation based on population, except in certain counties having a large number of persons who do not qualify as electors through failure to pay the poll tax.

The requirement that the districts are to be of contiguous territory is designed to protect against gerrymandering of districts; and that providing that no county can have more than one senator protects rural and small town people who did not want to lose

control of the legislature to the more thickly populated cities. It results, of course, in making populous cities with a large number of qualified electors underrepresented.

Article III, Section 26, Apportionment of Members of House of Representatives

Sec. 26. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

INTERPRETATIVE COMMENTARY

As distinguished from the senate, representation in the house is apportioned among the counties according to the total population; the unit of representation used as a basis for the formulation of districts and the allotment of members being the number of inhabitants divided by the number of representatives. The basis of apportionment, then, is the population of the state divided by the membership of the house which is 150.

The constitutions of Texas have, from the beginning, apportioned representation in the house on inhabitants or population, although some of the earlier constitutions provided that free or slave Ne-

groes and Indians not taxed were not to be counted in determining such apportionment.

Apportionment, as provided by Section 26, is designed to assure equality of representation among the population of the state, a fundamental principle of representative government.

This principle is carried out in provisions permitting a county having sufficient population to have more than one representative. At such time it is made a separate district. Moreover, if a county does not have the required population it must be joined to a contiguous county to form a representative district; and further, in cases where a county has a surplus of population, enough for one or more representatives, but not for another, it may be joined with a contiguous county or counties in a legislative district and be permitted to elect a flotorial representative as a means of providing representation for the extra population.

Despite the fact that equality of representation is the rule, a constitutional amendment violating this principle was adopted in 1936. This amendment had the declared purpose of restricting representation from the larger cities. It did so by limiting to seven the number of representatives from any one county unless the population exceeds 700,000 in which event one additional representative is allowed for each 100,000.

This amendment shows the continuation of the old rivalry between rural and urban areas, and is a discrimination in favor of the former. As such, it aids in permitting the rural areas to maintain their supremacy in the House of Representatives.*

Article III, Section 28, Time for Apportionment; Apportionment by Legislative Redistricting Board

Sec. 28. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event

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*Note—the provision referred to immediately above is article 26a. It is not reproduced in this appendix because clearly in violation of this Court's rulings. It is not pertinent to the present case.

the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. Such apportionment shall be in writing and signed by three (3) or more of the members of the Board duly acknowledged as the act and deed of such Board, and, when so executed and filed with the Secretary of State, shall have force and effect of law. Such apportionment shall become effective at the next succeeding statewide general election. The Supreme Court of Texas shall have jurisdiction to compel such Commission to perform its duties in accordance with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. The Legislature shall provide necessary funds for clerical and technical aid and for other expenses incidental to the work of the Board, and the Lieutenant Governor and the Speaker of the House of Representatives shall be entitled to receive per diem and travel expense during the Board's session in the same manner and amount as they would receive while attending a special session of the Legislature. This amendment shall become effective January 1, 1951. As amended Nov. 2, 1948.

INTERPRETATIVE COMMENTARY

In line with the principle of equality of representation of all voters of the state, it is required that the legislature, after the publication of each United States decennial census, reapportion its membership agreeably to the provisions of Article III, Sections 25, 26 and 26a.

It can readily be seen that if such reapportionment is not carried out, shifts in populations will make certain portions of the state over-represented and others underrepresented in the senate and the house, and a person's vote and political power will not have as much weight in one part of the state as in another.

Although the Constitution of 1876 made it obligatory upon the legislature to reapportion after each decennial census, as of 1948 there had been no reapportionment since 1921, and it would seem that there was no method to force the legislature to reapportion even though it violated a constitutional duty, for under the doctrine of separation of powers, the courts cannot interfere to compel the legislature to perform a legislative duty.

To remedy this situation, Section 28 was amended in 1948 so that periodic reapportioning could be assured. It was provided that should the legislature fail to reapportion at its first regular session after the publication of the decennial census, it must be done by the Legislative Redistricting Board of Texas.

This Board, an ex officio body, is composed of the Lieutenant Governor, the Speak of the House of Representatives, the Attorney General, the Land Commisisoner, and the State Comptroller. It is required to meet sixty days after the adjournment of the legislature which failed to reapportion, and by majority vote redistrict the state into senatorial and representative districts. When such apportionment is executed and filed with the Secretary of State, it has the force and effect of law.

In order to compel action by the Board so that it cannot escape performance of its duty, jurisdiction is given to the Supreme Court of Texas to force it to perform its duties in accordance with the provisions of this section.

Preston SMITH, Governor of the State of Texas, et al., Appellants,

v.

Tom CRADDICK, et al., Appellees.

No. B-2932.

Supreme Court of Texas.

Sept. 16, 1971.

REAVLEY, Justice.

The appellees (Tom Craddick, Robert L. Monaghan, George Willeford, and James L. Kent) as a member of the Texas Legislature, the Republican County Chairman of Midland County, the Republican State Chairman, and as qualified voters, brought this suit as a class action on behalf of all voters of Texas to obtain declaration of the unconstitutionality of House Bill No. 783, 62nd Legislature, Regular Session, 1971,[1] and to enjoin the appellants (Preston Smith, Crawford Martin, Martin Dies, Jr., Elmer Baum, Rosenelle Cherry and Barbara Culver) who hold the offices of Governor and Secretary of State of Texas, Chairman of the State Democratic Executive Committee, County Clerk and County Judge of Midland County, from acting to conduct any election procedure pursuant to that House Bill No. 783. The district court entered its final judgment on August 10, 1971, declaring the statute unconstitutional and permanently enjoining the Secretary of State from conducting elections thereunder. The appellants filed their appeal directly to this court pursuant to Art. 1738a, Vernon's Ann.Civ.St. and Rule 499a, Texas Rules of Civil Procedure; and their motion to advance

[1]Chapter 981, pg. 2974 of Vernon's Texas Session Law Service, Laws 1971, 62nd Legislature, Art. 195a-3, Secs. 1-5, Vernon's Ann.Civ.St.

the cause filed on September 3 was granted and the cause was submitted on September 9.

By the statute in question the Legislature has redrawn the representative districts of the state from which members of the House of Representatives of the Texas Legislature are elected. The statute is attacked as violating Section 26, Article III of the Texas Constitution, Vernon's Ann.St. The constitutionality of this redistricting statute is the only question presented to us by the briefs and record. Furthermore, it is the only question over which we have jurisdiction in the direct appeal. State v. Spartan's Industries, Inc., 447 S.W.2d 407 (Tex.1969).

Article III, Section 26 of the Texas Constitution has provided since 1876 as follows:

> "The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties."

Representation in the House of Representatives is thereby apportioned among the counties of the state

according to population. If the population of a county is so small as not to entitle that county to one representative, two or more contiguous *counties* may be joined in a separate district. When one county has a population which exceeds that which entitles it to one or more representatives, that *county* is to be apportioned to what it is entitled, and the *county* may be joined with contiguous counties for the district representative to which the surplus population entitles it. No restriction is seen in this language to prevent drawing district lines within a single county.

The Legislature met the constitutional requirements from 1875 until 1966 in that no county was divided to form a representative district across the county line. Then came the Kilgarlin case in which the three judge federal court struck the flotorial representative districts of the Texas statute then in effect (Kilgarlin v. Martin, 252 F.Supp. 404, S.D.Tex. 1966) and the Supreme Court held that the population variation between the districts required further justification (Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771, 1967). These decisions followed the decisions of the United States Supreme Court holding that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires substantially equal legislative representation for all citizens of a state. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). *Cf.* Hadley v. Junior College District, 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970); Kirkpatrick v. Preisler, 394 U.S. 526 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); Avery v. Midland County, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968).

The requirement of the United States Constitution

takes precedence and any inconsistency therewith in the Texas Constitution is thereby vitiated. Whatever Section 26 of Article III provides, there must be equal representation to accord with the holdings of the federal courts. The paramount consideration is the variation, per representative, between the population of the various districts. This variation is usually computed by beginning with the ideal or average district population (in Texas with a 1970 population of 11,196,730 and 150 representatives, that ideal is 74,645), figuring the percent by which the district of the smallest population is over represented and the percent by which the district of the largest population is under-represented, and then adding the two percentage figures together. In Swann v. Adams, 385 U.S. 440, 87 S.Ct. 569, 17 L. Ed.2d 501 (1967) the Florida senate districts under attack ranged from 15.09% overrepresentation to 10.56% underrepresentation, and the representative districts ranged from 18.28% overrepresentation to 15.27% underrepresentation. The variation or deviation was thus 25.65% in the senate districts and 33.55% in the representative districts. These variations were held to render the Florida plan unconstitutional in the absence of acceptable reasons for the variances. The Texas representative districts considered in the Kilgarlin case, supra, varied from 14.84% overrepresentation to 11.64% underrepresentation. The U. S. Supreme Court held that these variances invalidated the apportionment plan unless satisfactorily justified. A reading of the opinions of the lower court and the Supreme Court leaves us with the impression that justification of those variances would be extremely difficult to make to the satisfaction of the Supreme Court.

Another problem is the flotorial district. There is no federal objection to a district that includes several counties, but if the district includes within its boun-

daries the boundaries of another district or districts, an impermissible population disparity is likely. The larger district may be tested against the ideal as to population variation on the basis of only the member or members elected directly from that particular district, in which case the variation would probably be substantial. Furthermore, the voters who reside within that portion of the flotorial district which composes the encompassed district vote for more than one representative, and the effect is to debase the votes of others who reside in the flotorial district outside the encompassed district. Kilgarlin v. Martin, 252 F.Supp. 404, 418.

Primary considerations of the Fourteenth Amendment of the United States Constitution as laid down by the federal courts have the following effect upon the Texas Constitution (Art. III, Section 26):

1. Section 26 requires that apportionment be by county and when two or more counties are required to make up a district of proper population, the district lines shall follow county boundaries and the counties shall be contiguous. A county not entitled to its own representative must be joined to contiguous counties so as to achieve a district with the population total entitled to one representative. The only impairment of this mandate is that a county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment. We are not to be understood as proscribing multi-member districts within a single county; in the absence of some discriminatory effect neither state nor federal constitution presents any obstacle there. Fortson v. Dorsey, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965); cf. Connor v. Johnson, 402 U.S. 690, 91 S.Ct. 1760, 29 L. Ed.2d 268 (1971).

2. The first clause of the provisio dictates that a county must be formed into a separate district if it has sufficient population for one representative. This would be effective only so long as the population of that county is within permissible limits of variation. If the population of the county is slightly under or over the ideal population figure, the state constitution requires that the county constitute a separate district.

3. The final clause of Section 26 dictates that, for any surplus population, the *county* shall be joined with contiguous county or counties in a flotorial district. This dictate is nullified.

4. With the nullification of the dictate relative to use of the surplus population (less than enough for a district) of a county which already has one or more representatives allocated thereto, it becomes permissible to join a portion of that county (in which the surplus population reside and which is not included in another district within that county) with contiguous area of another county to form a district. For example, if a county has 100,000 population, and if a district of 75,000 population is formed wholly within that county, the *county* is given its district, and the area wherein the 25,000 live may be joined to a contiguous area.

5. It is still required that a county receive the member or members to which that county's own population is entitled when the ideal district population is substantially equalled or is exceeded. No exception to this requirement is made by what is said in 4. above. Again, all requirements of Section 26 are inferior to the necessity of complying with the Equal Protection Clause.

The district plan enacted by the 62nd Legislature in 1971, House Bill 783, cuts the boundaries of 33 counties. Forty-three districts include only a portion of one

or more counties with the contiguous county or counties. Eighteen counties with less than 74,645 population were divided, and portions of each of those counties were placed in two or more districts. Although Grayson County has a population of 83,225, that *county* was not apportioned a representative as required by Section 26, but a portion of the county was placed in district 14 with Fannin County, and the remaining portion of Grayson was placed in district 60 with counties to the west.

[1] Appellants offered no evidence to establish that the wholesale cutting of county lines, as provided in House Bill 783, was either required or justified to comply with the one-man, one-vote decisions. The burden is on one attacking an act to establish its invalidity. Texas National Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627 (1939); Lombardo v. City of Dallas, 124 Tex. 1, 73 S.W.2d 475, (1934). Appellees proved conclusively that this statute fails to do what is required by the constitution in those respects discussed in paragraphs 1. and 5. above. No presumption of validity remained in the face of that showing. If these districting requirements were excused by the requirements of equal representation, the appellants had the burden of presenting that evidence. They presented none.

[2] Giving all weight and presumption to favor the act of the Legislature, this statute clearly violates the constitution. This court must therefore give effect to the language of the constitution without regard to the consequences. Cramer v. Sheppard, 140 Tex. 271, 167 S.W.2d 147 (1942). The statute must be declared invalid in its entirety. See Smith v. Patterson, 111 Tex. 535, 242 S.W. 749 (1922).

[3] The Attorney General in his brief for appellants puts our choice in these words:

"The Court in the instant case is faced with the complex problem of deciding whether to invalidate an extremely complex legislative enactment or making the determination that Reynolds v. Sims and the numerous ensuing cases in this area have rendered the restrictive provisions in Section 26 of Article III of the Constitution of Texas as no longer operable and binding upon the Legislature of the State of Texas in redistricting the House of Representatives or Senate."

We understand some of the difficulties of every undertaking to redictrict this state. However, this court may not abrogate any provision of the constitution for the sake of simplicity. The federal requirement of equal representation clearly has not nullified Section 26 of Article III in its entirety. Then certainly this court may not choose to do so.

[4] The appellees filed a motion to dismiss this appeal for want of jurisdiction, their contention being that a question of fact existed in the trial court. This record established conclusively the unconstitutionality of the statute and presented to the trial court and to this court no contested issue of fact but only a question of law. Rule 499a(c), T.R.C.P.; Railroad Commission v. Sterling Oil & Refining Co., 147 Tex. 547, 218 S.W. 2d 415 (1949). The motion to dismiss is overruled.

The judgment of the trial court is affirmed. No motion for rehearing may be filed in this cause.

DANIEL, J., not sitting.

Oscar H. MAUZY, Relator,

v.

The LEGISLATIVE REDISTRICTING BOARD et al, Respondents.

No. B-2955.

Supreme Court of Texas.

Sept. 27, 1971.

CALVERT, Chief Justice.

Sec. 28, Art. III, Constitution of Texas, Vernon's Ann.St. provides:

"Sec. 28. The Legislature shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts, agreeable to the provisions of Sections 25, 26, and 26-a of this Article. In the event the Legislature shall at any such first regular session following the publication of a United States decennial census, fail to make such apportionment, same shall be done by the Legislative Redistricting Board of Texas, which is hereby created, and shall be composed of five (5) members, as follows: The Lieutenant Governor, the Speaker of the House of Representatives, the Attorney General, the Comptroller of Public Accounts and the Commissioner of the General Land Office, a majority of whom shall constitute a quorum. Said Board shall assemble in the City of Austin within ninety (90) days after the final adjournment of such regular session. The Board shall, within sixty (60) days after assembling, apportion the state into senatorial and representative districts, or into senatorial or representative districts, as the failure of action of such Legislature may make necessary. * * * The Supreme Court of Texas shall have jurisdiction to compel such Commission to perform its duties in accordance

with the provisions of this section by writ of mandamus or other extraordinary writs conformable to the usages of law. * * *"

The section in its present form was adopted as an amendment to the constitution in 1948.

The regular session of the 62nd Legislature, which convened January 12, 1971 and adjourned May 31, 1971, enacted a statute, ch. 981, p. 2974 (Art. 195a-3, §§ 1-5, Vernon's Ann.Civ.St.), apportioning the state into representative districts, but it failed to enact a statute apportioning the state into senatorial districts. The officials constituting the Legislative Redistricting Board as provided in the constitution met formally for the first time on August 24, 1971 for the announced purpose of apportioning the state into senatorial districts.

On August 10, 1971, the District Court for the 53rd Judicial District, Travis County, declared the representative district apportionment act invalid, and a direct appeal was taken to this court. On September 16 we affirmed the trial court's judgment. See Smith, et al. v. Craddick et al., 471 S.W.2d 375 (Tex.Sup.1971).

Following our action in Smith v. Craddick, relator, Honorable Oscar H. Mauzy, through counsel, petitioned the Legislative Redistricting Board to proceed to apportion the state into representative as well as senatorial districts. The Board declined, stating in a formal resolution as its reason for so doing that it was the Board's official position that it had no jurisdiction to apportion for representative districts inasmuch as the Legislature had enacted a statute apportioning for such districts, and the invalidation of the statute by judicial action did not serve to confer jurisdiction on the Board. As a consequence of that action, relator insti-

tuted this direct proceeding in this court seeking, primarily, a writ of mandamus to compel the Board to redistrict for representative districts.

On September 17 we authorized intervention in the proceeding by Honorable Fred Head, a member of the House of Representatives, who had been asserting in a suit in the trial court, and wished to assert here, that the 1970 decennial census had not been "published" before the regular session of the 62nd Legislature convened; that the regular session of the 63rd Legislature which convenes the second Tuesday in January, 1973, will, therefore, be the "first regular session" *after*[1] publication of the census, and only it has jurisdiction under the constitution to redistrict; that since the regular session of the 62nd Legislature had no jurisdiction to redistrict, the Board has none.

The contention of intervenor should be considered first; if it is sound, all other issues in the case are moot and immaterial. However, we do not think the contention is sound.

[1] Admittedly, the language of the opening sentence of Sec. 28, Art. III, quoted above, is subject to the interpretation intervenor places upon it; but when we consider the object and purpose of Sec. 28, in the light of its history, we do not think the interpretation is a reasonable one. That object and purpose obviously was to get on with the job of legislative redistricting which had been neglected or purposely avoided for more than twenty-five years. Intervenor's interpretation would require interpolation of the word "convened" into the constitutional provision and he would thus interpret it as saying that the Legislature shall apportion into districts "at its first regular session

[1]Emphasis ours throughout unless otherwise indicated.

[convened] after publication of each United States decennial census. * * *" The law permits the interpolation of words into a constitutional or statutory provision when necessary to achieve clear intent, Sweeny Hospital District v. Carr, 378 S.W.2d 40, at 47 (Tex. Sup.1964); Halbert v. San Saba Springs Land & Live-Stock Ass'n, 89 Tex. 230, 34 S.W. 639, 49 L.R.A. 193 (1896); but interpolation should not be resorted to when to permit it will defeat overriding intent.

[2] We are convinced that the overriding intent of the people in adopting Sec. 28 was to permit apportionment of the state into legislative districts at the regular session of the Legislature which is convened in January following the taking of the census, if publication is either before convening or during the session. We recognize that this interpretation can mean that on some occasions the Legislature may have only a few weeks, or even only a few days, in which to put the finishing touches on a redistricting bill, with jurisdiction in the Board to complete the task in the event of legislative failure; but the other side of the coin can be a two year delay in making legislative redistricting effective if redistricting legislation must be postponed until a second regular session when census publication occurs a few days or a few weeks after convening of the first regular session. Having concluded that intervenor is wrong in his basic position, we find it unnecessary to decide when "publication" of the 1970 census actually occurred, although we note in passing that intervenor's counsel stated in oral argument that by February 18, 1971, the Legislature had been furnished all census figures necessary to apportion the state into legislative districts.

[3] The next issue which commands our attention is whether enactment of the invalid statute attempting

apportionment of the state into representative districts robs the Board of jurisdiction to apportion the state into such districts. We hold that it does not.

[4] In support of its position that it does, the Board cites, particularly, State ex rel. Lein v. Sathre, 113 N.W.2d 679 (N.D.Sup.1962) and Yorty v. Anderson, 60 Cal. 2d 312, 33 Cal.Rptr. 97, 384 P.2d 417 (1963). Decisions of courts of other jurisdictions, even if based upon identical facts, are no more than persuasive, and they are persuasive only to the extent that their reasoning is regarded as logical. State v. Sathre is obviously inapposite. It appears from the opinion in the case that North Dakota, like Texas, has provided in its constitution for a board or commission to apportion the state into legislative districts if the legislature fails to do so at its first regular session after each decennial census. The board is required to make its apportionment within ninety days after adjournment of the legislative session. The legislature failed to apportion and the board proceeded to perform its duty. The supreme court declared the apportionment invalid, and, in response to an argument that the ninety day period having expired and there was no agency having authority to apportion further, the court held that the legislature had continuing authority to apportion into legislative districts. That is not our question.

The decision of the Supreme Court of California in Yorty v. Anderson is based upon a state of facts more nearly like the facts in this case. At the time of the *Yorty* decision, Sec. 6 of Art. IV of the California Constitution provided that the legislature should, at its first regular session following each decennial census, reapportion the state into legislative districts on the basis of equal population, but that in the formation of senatorial districts no county, or city and county,

should contain more than one senatorial district. Provision was made for reapportionment by a Reapportionment Commission if the legislature should "fail to reapportion the assembly and senatorial districts." Although the legislature had enacted a legislative apportionment law, suit was filed to compel the commission to reapportion senatorial districts on the theory that the constitutional provision limiting any one county to one senatorial district violated the Equal Protection Clause of the federal constitution. The court held that the commission had no authority to act, even if the provision of Sec. 6 and the legislative enactment were invalid, because the legislature had "acted," whether validly or invalidly.

[5, 6] The Texas constitutional provision differs from the California constitutional provision in that the Texas Legislature is directed to "apportion the state" into legislative districts "agreeable to the provisions of Sections 25, 26, and 26a of this Article [Art. III]." The Board is created to make apportionment in the event the Legislature shall "fail to make *such* apportionment." Finally, the Board is directed to apportion the state into such legislative districts "as the failure of action of such Legislature may make necessary." Now, obviously, when all of the quoted provisions are harmonized, the failure to make "such apportionment" referred to in the second quoted provision, and the "failure of action" referred to in the third quoted provision, relate back to the requirement that the apportionment by the Legislature be "agreeable to Sections 25, 26, and 26a" of Article III. It was precisely because the apportionment act of the 62nd Legislature was not agreeable to Sec. 26 that it was invalidated by this court in Smith v. Craddick, supra. We hold that upon the failure of the Legislature to apportion rep-

resentative districts agreeable to Sec. 26 of Art. III of the constitution, the duty to apportion for such districts devolved upon the Board.

We could rest our decision of the question last discussed on the very narrow ground just stated. We deliberately do not do so, however, preferring to write with broader sweep. We do not agree with the California court's conclusion that the Board's jurisdiction is conditioned upon the Legislature's "failure to act." That is not what our constitution says as we read it. By the constitution the Board's jurisdiction to apportion is conditioned upon the Legislature's failure "to make such apportionment." An apportionment which is invalid, for whatever reason, is no apportionment; and the Board's duty to proceed with apportioning the state into representative districts accrued when the regular session adjourned on May 31, 1971 without having enacted a valid apportionment statute.

Inasmuch as we have held that the Board must apportion, we do not have before us and may not decide whether a special session of the Leigslature could apportion if the power did not reside in the Board or if the Board's own scheme were declared invalid.

[7] The regular session of the 62nd Legislature amended Art. 29d, Vernon's Texas Civil Statutes, to read, in part:

"Section 1. Neither the state nor any political subdivision or agency thereof except the Legislature shall ever officially recognize or act upon any report or publication, in whatever form, of any Federal Decennial Census, either as a whole or as to any part thereof, before the first day of September of the year immediately following the calendar year during which such census was taken."

If this statute was intended to prevent action by the Legislative Redistricting Board before September first of the year referred to on the basis of census figures theretofore published, it is ineffective in so far as it conflicts with Sec. 28, Art. III of the constitution as we have interpreted it.

[8, 9] Relator requests that we direct the Board to apportion only into single-member districts as opposed to multi-member districts. We deny the request. Within certain constitutional limitations, apportionment involves the judgment and discretion of the Board. It is well settled that mandamus never lies to control official discretion of a state board. Industrial Accident Board v. Glenn, 144 Tex. 378, 190 S.W.2d 805 (1945); McDowell v. Hightower, 111 Tex. 585, 242 S.W. 753, at 754 (1922); Matthaei v. Clark, 110 Tex. 114, 216 S.W. 856, at 862 (1919). The manner in which the Board apportions the state into new districts is entirely within the judgment and discretion of the Board, so long as it acts within the limitations imposed by the Constitutions of the State of Texas and of the United States. The applicable state and federal constitutional guidelines are discussed in this court's opinion in Smith v. Craddick, supra. It is unnecessary to repeat them here. In holding that "a county may be divided if to do so is necessary in order to comply with the equal population requirement of the Fourteenth Amendment," we stated in *Craddick* that this court was not to be understood as proscribing multi-member districts within a single county in the absence of some discriminatory effect.

In exercising its discretion as to whether to create multi-member districts within a single county, we must assume that the Board will give careful consideration to the question of whether or not the creation of any particular multi-member district would result in dis-

crimination by minimizing the voting strength of any political or racial elements of the voting population. See Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, at 1869, 29 L.Ed.2d 363 (1971).

[10, 11] One other matter deserves brief attention. Relator has requested this court to (1) "issue a declaratory judgment declaring the 1967 apportionment along with its amendments of 1969 of the Texas House of Representatives unconstitutional"; (2) "enjoin the election officials of the State of Texas from holding any elections under any apportionment scheme" until this court "has passed upon the constitutionality of said scheme"; and (3) "maintain jurisdiction of the parties on [sic] the subject matter of this case until the final determination can be made as to the constitutionality of any apportionment scheme promulgated." Relator asserts that jurisdiction to grant the relief sought is found in that provision of Sec. 28, Art. III authorizing the court to compel the Board to perform is duties "by writ of mandamus *or other extraordinary writs* conformable to the usages of law. * * *" Relator reads too much into the phrase "or other extraordinary writs." It seems far more reasonable and logical to hold that the phrase refers to writs of procedendo, certiorari, prohibition, quo warranto, and other such common law writs rather than that we should enter upon such innovative courses of procedure as those suggested. We do so hold.

A writ of mandamus will issue to the Legislative Redistricting Board of Texas as sought. No motion for rehearing will be entertained.

DANIEL, J., not participating.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION NO. A-71-CA-142
CURTIS GRAVES, ET AL.
vs.
BEN BARNES, ET AL.

CIVIL ACTION NO. A-71-CA-143
DIANA REGESTER, ET AL.
vs.
BOB BULLOCK, ET AL.

CIVIL ACTION NO. A-71-CA-144
JOHNNY MARIOTT, ET AL.
vs.
PRESTON SMITH, ET AL.

CIVIL ACTION NO. A-71-CA-145
VAN HENRY ARCHER, JR., ET AL.
vs.
PRESTON SMITH, ET AL.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that VAN HENRY ARCHER, JR., individually and as Chairman of the Bexar County Republican Party, M. O. TURNER, MRS. LOIS WHITE, RICHARDSON B. GILL, MRS. MARY LOUISE PINO, and MRS. MARY MARTIN JACKSON, Plaintiffs in Civil Action No. A-71-CA-145, hereby appeal to the Supreme Court of the United States from that part of the final judgment denying relief to Plaintiffs, ARCHER, ET AL., on January 28, 1972. Said appeal being directed to the Court's

judgment denying said Plaintiffs the relief they sought in having the Texas Senatorial Apportionment Plan adopted by the Texas Legislative Redistricting Board declared unconstitutional, and to the adoption of the Senatorial Reapportionment Plan presented by Plaintiffs.

This appeal is taken pursuant to 28 U.S.C., Sec. 1253, and/or 28 U.S.C., 2101(b).

NATHAN W. EASON

J. DOUGLAS MCGUIRE
400 Alamo National Building
San Antonio, Texas 78205
Attorneys for Van Henry Archer, Jr., et al.

CERTIFICATE OF SERVICE

On this, the 24th day of February, 1972, a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was forwarded to all counsel of record in the manner prescribed by Rule 33 of the United States Supreme Court.

NATHAN W. EASON

SUPREME COURT OF THE UNITED STATES

NO. A-795

CURTIS GRAVES ET AL.
v.
BEN BARNES, ET AL.

DIANA REGESTER, ET AL.
v.
BOB BULLOCK, ET AL.

JOHNNY MARIOTT, ET AL.
v.
PRESTON SMITH ET AL.

VAN HENRY ARCHER, JR.
v.
PRESTON SMITH ET AL.

[February 7, 1972]

APPLICATION FOR A STAY OF A JUDGMENT OF A THREE-JUDGE DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MR. JUSTICE POWELL, Circuit Justice.

This is an application for a stay of the judgment of a three-judge court sitting in the Western District of Texas. The court's decision covers issues raised in four consolidated actions. The principal issues were as follows:

1. In *Graves v. Barnes,* plaintiffs challenged the

State's reapportionment plan for the senatorial districts in Harris County (Houston) on the ground that they were racially gerrymandered.

2. In *Regester v. Bullock,* the State's reapportionment plan for the Texas House of Representatives was challenged on the grounds of population deviations from the one-man, one-vote requirement, and on the impermissibility of use of multi-member districts in the metropolitan communities.

3. In *Mariott v. Smith,* the House plan provision calling for a multi-member district for Dallas County was challenged.

4. In *Archer v. Smith,* a generally similar attack was levelled against the use of multi-member districting in Bexar County (San Antonio).

The four cases were consolidated and tried by a single three-judge panel. After full pretrial discovery, during which over 2,000 pages of depositions were taken, the District Court heard testimony at a three-and-one-half day hearing. The extensive *per curiam* opinion, and the concurring and dissenting opinions, which were handed down after some three weeks of deliberation, reflect a careful and exhaustive consideration of the issues in light of the facts as developed. The court's conclusions, in substance, were as follows:

(a) The Senate redistricting plan, as promulgated by the Texas Legislative Redistricting Board, was approved.

(b) The House redistricting plan was held violative of the Equal Protection Clause because of population deviations from equality of representation. But, in an exercise of judicial restraint, the court suspended its decision in this respect for the purpose of affording

the Legislature of Texas an opportunity to adopt a new and constitutional plan. Meanwhile, the forthcoming election may be held under the plan found to be deficient.

(c) The multi-member district plans for Dallas and Bexar Counties were found to be unconstitutional under the standard prescribed by this Court in *Fortson v. Dorsey,* 379 U. S. 433, 438-39 (1965); *Burns v. Richardson,* 384 U. S. 73, 88 (1966); and *Whitcomb v. Chavis,* 403 U. S. 124, 143 (1971). The three-judge court found from the evidence that these multi-member district plans would operate to minimize or cancel out the voting strength of racial minority elements of the voting population, and ordered the implementation of a plan calling for single-member districts for Dallas and Bexar Counties. The State offered no plan for single-member districts for these counties, and the court was compelled to draft its own plan. To minimize the disruptive impact of its ruling the court ordered that the State's requirement that candidates run from the district of their residence be abated for the forthcoming election. A candidate residing anywhere within the county, therefore, may run for election from any district in the county.

(d) The evidence with respect to nine other metropolitan multi-member districts was found insufficient to warrant treatment similar to that required for Dallas and Bexar Counties.

(e) Finally, the court's order stated that its judgment was final and that no stays would be granted.

In view of the foregoing holdings, the only present necessity to consider a stay relates to the District Court's decision with respect to multi-member districts in Dallas and Bexar Counties. A number of principles

have been recognized to govern a Circuit Justice's in-chambers review of stay applications. Stays pending appeal to this Court are granted only in extraordinary circumstances. A lower court judgment, entered by a tribunal that was closer to the facts than the single Justice, is entitled to a presumption of validity. Any party seeking a stay of that judgment bears the burden of showing that the decision below was erroneous and that the implementation of the judgment pending appeal will lead to irreparable harm.

As a threshold consideration, Justices of this Court have consistently required there be a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. See *Mahon v. Howell*, 404 U. S. 1201, 1202 (1971); *Organized Village of Kake v. Egan*, 80 S. Ct. 33, 4 L. ed. 2d 34 (1959). Of equal importance in cases presented on direct appeal—where we lack the discretionary power to refuse to decide the merits—is the related question whether five Justices are likely to conclude that the case was erroneously decided below. Justices have also weighed heavily the fact that the lower court refused to stay its order pending appeal, indicating that it was not sufficiently persuaded of the existence of potentially irreparable harm as a result of enforcement of its judgment in the interim.

In applying these considerations to the present case, I conclude that a stay should not be granted. The case received careful attention by the three-judge court, the members of which were "on the scene" and more familiar with the situation than the Justices of this Court; and the opinions attest to a conscientious application of principles enunciated by this Court. Moreover, the order of the court was narrowly drawn to ef-

fectuate its decision with a minimum of interference with the State's legislative processes, and with a minimum of administrative confusion in the short run.

Following a practice utilized by other Justices in passing on applications raising serious constitutional questions (see *Meredith v. Fair,* 83 S. Ct. 10, 9 L. ed. 2d 43 (1962); *McGee v. Eyman,* 83 S. Ct. 230, 9 L. ed 2d 267 (1963)), I have consulted informally with each of my Brethren who was available* at this time during the recess. Although no other Justice has participated in the drafting of this opinion, I am authorized to say that each of them would vote to deny this application. My denial of a stay at this point, of course, may not be taken either as a statement of my own position on the merits of the difficult questions raised in this case, or as an indication of what may, in fact, ultimately be the view of my Colleagues on the Court.

The application is denied.

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*All Justices, save two who were not available, have been consulted.